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Title: United States, Petitioner
v.
Nordic Village, Inc., David O. Simon, Trustee

Docketed:
April 23, 1991

Court: United States Court of Appeals
for the Sixth Circuit

See also:
90-1208

Counsel for petitioner: Solicitor General

Counsel for respondent: Baumgart,Richard, Simon,David O.

Entry	Date	Note	Proceedings and Orders
1	Apr 23 1991	G	Petition for writ of certiorari filed.
3	May 24 1991		Brief of respondent Nordic Village, Inc. in opposition filed.
2	May 28 1991		DISTRIBUTED. June 13, 1991
4	May 31 1991	X	Reply brief of petitioner United States filed.
5	Jun 17 1991		Petition GRANTED.
			**********
6	Aug 1 1991		Joint appendix filed.
7	Aug 1 1991		Brief of petitioner United States filed.
8	Aug 29 1991		Record filed.
		*	Certified Original Record - United States District Court, Northern District of Ohio (1 envelope)
9	Sep 3 1991		Brief of respondent Nordic Village, Inc. filed.
10	Sep 10 1991		Record filed.
		*	Certified record and briefs - United STates Court of Appeals for the Sixth Circuit.
11	Oct 7 1991		Reply brief of petitioner United States filed.
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13	Oct 24 1991		CIRCULATED.
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(1)

No. 90-1629

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code (11 U.S.C.) waives the sovereign immunity of the United States from an action seeking a monetary recovery in bankruptcy.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert E. Martin, Lake County Treasurer, was a defendant in the district court and the bankruptcy court. John Howard and the State of Ohio, Department of Taxation, were defendants in the bankruptcy court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	10
Conclusion	19
Appendix A	1a
Appendix B	37a
Appendix C	41a
Appendix D	45a
Appendix E	46a
Appendix F	51a
Appendix G	53a
Appendix H	55a
Appendix I	57a

TABLE OF AUTHORITIES

Cases:

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985)	13
Block v. *North Dakota*, 461 U.S. 273 (1983)	14
Dellmuth v. *Muth*, 491 U.S. 223 (1989)	15
Hoffman v. *Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989)	6, 7, 8, 9, 11, 12, 13, 15, 16, 18
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	17
Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990)	14
Lehman v. *Nakshian*, 453 U.S. 156 (1981)	14
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	14
Missouri v. *Jenkins*, 491 U.S. 274 (1989)	14
Neavear v. *Schweiker*, 674 F.2d 1201 (7th Cir. 1982)	18

Cases—Continued: Page

Pearson v. *United States*, 917 F.2d 1215 (9th Cir. 1990), petition for cert. pending, No. 90-1208 12
SBA v. *Rinehart*, 887 F.2d 165 (8th Cir. 1989) 8, 11, 12
United States v. *Energy Resources Co., Inc.*, 110 S. Ct. 2139 (1990) 1
United States v. *King*, 395 U.S. 1 (1969) 14
United States v. *Mitchell*, 445 U.S. 535 (1980) 14
United States v. *Testan*, 424 U.S. 392 (1976) 14

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 8, Cl. 4 (Bankruptcy Clause) 6
Amend. XI 6, 7, 10-11, 13, 14
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333..... 3
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 1, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(4)(A) 17
11 U.S.C. 101(26) 5
11 U.S.C. 106 .....2, 5, 8, 9, 10
11 U.S.C. 106(a) 5, 6, 16, 17
11 U.S.C. 106(b) 5, 6, 16, 17
11 U.S.C. 106(c) .....*passim*
11 U.S.C. 106(c)(1) 16
11 U.S.C. 106(c)(2) 16
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 362 12
11 U.S.C. 362(a) 11
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 542(b) 7
11 U.S.C. 547 13
11 U.S.C. 547(b) 7
11 U.S.C. 549 .....2, 3, 7, 13
11 U.S.C. 549(a)(1) 3
11 U.S.C. 550 ..... 2, 3, 7
11 U.S.C. 550(a) 7, 16
11 U.S.C. 550(b)(1) 3
Ch. 7, 11 U.S.C. 701-766 7
Ch. 11, 11 U.S.C. 1101-1174 2

Statutes and rules—Continued: Page

Civil Rights Act of 1964, Tit. VIII, 42 U.S.C. 2000e *et seq.* 14
28 U.S.C. 157 3
28 U.S.C. 158(d) 4
Bankr. R. 8001, 11 U.S.C. App. 4
Fed. R. Civ. P. 13(a) 6
N.D. Ohio Gen. Order 84 3

Miscellaneous:

S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 915 F.2d 1049. The decisions and orders of the district court (App., *infra*, 37a-45a) and the decision and orders of the bankruptcy court (App., *infra*, 46a-52a) are not yet reported.

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[1] The Internal Revenue Service was erroneously named as the governmental party in the proceedings below. Accordingly, we have substituted the United States as the proper party in the caption of this petition. We took the same approach under similar circumstances in a case decided by this Court last Term, *United States* v. *Energy Resources Co.*, 110 S. Ct. 2139 (1990). See U.S. Br. in *Energy Resources*, No. 89-255, at 1 n.1.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1990 (App., *infra*, 55a-56a). A petition for rehearing was denied on January 23, 1991 (App., *infra*, 53a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 106, 549, and 550 of the Bankruptcy Code (11 U.S.C.) are set forth in the petition appendix (App., *infra*, 57a-60a).

STATEMENT

1. On March 27, 1984, Nordic Village, Inc., doing business as Swiss Haus, filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174 (App., *infra*, 2a). In June 1984, the Internal Revenue Service (IRS) was notified of the bankruptcy, and later filed a proof of claim against the estate seeking payment of delinquent employment taxes, penalties, and interest totaling about $80,000.

On July 18, 1984, Josef Lah, an officer and shareholder of Nordic Village, wrote a counter check to AmeriTrust Company for $26,000, which was drawn on Nordic Village's corporate account. Lah had the bank issue him several cashier's checks, including a check for $20,000 payable to the IRS. The $20,000 check to the IRS bore the notation "REMITTER: SWISS HAUS, INC." Although the notation was later crossed out (the facts do not establish when or by whom), it remained legible. Lah delivered the check to the IRS and directed the IRS to apply it against the outstanding tax liability he had incurred as sole proprietor of Josef's Hair Design. The IRS

credited his account accordingly. (App., *infra*, 2a, 38a).[2]

2. Respondent David O. Simon was appointed trustee for the debtor in August 1984 and subsequently commenced these adversary proceedings in the bankruptcy court for the Northern District of Ohio.[3] Respondent sought to recover several post-petition transfers, including the $20,000 transfer made by Lah to the IRS, alleging that they were voidable under Section 549 of the Code.[4] The government argued that it was protected from recovery under Section 550(b)(1) of the Code, because the IRS was a subsequent transferee who had received the transfer from the initial transferee, Lah, in good faith and without knowledge that the transfer was voidable.[5] The bankruptcy court re-

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[2] The record indicates that two of the other checks Lah obtained from AmeriTrust were used to pay his state and local taxes. App., *infra*, 41a-42a.

[3] The proceedings are governed by the Bankruptcy Code as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. The Bankruptcy Court for the Northern District of Ohio had jurisdiction over the proceedings pursuant to 28 U.S.C. 157, and Local General Order No. 84, entered by the District Court for the Northern District of Ohio on July 16, 1984.

[4] With exceptions not pertinent here, under Section 549 a trustee may avoid any unauthorized transfer of property of the estate "that occurs after the commencement of the case." 11 U.S.C. 549(a)(1).

[5] 11 U.S.C. 550 provides in relevant part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section * * * 549 * * *, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

jected this argument, holding that the IRS was the initial transferee, and entered judgment for $20,000 against the United States.[6] The government appealed to the district court pursuant to Rule 8001 of the Bankruptcy Rules, 11 U.S.C. App., at 275.

3. The district court affirmed and subsequently denied the government's motion to alter or amend the judgment. The court found that the IRS was either an initial transferee or, in the alternative, a subsequent transferee who, at the time of receipt, knew or should have known that the transfer was voidable.[7] The government appealed from this judgment to the court of appeals pursuant to 28 U.S.C. 158(d).

4. In the Sixth Circuit, the government renewed its contention that it was protected from recovery as a subsequent transferee without knowledge of the transfer's voidability. The government also contended

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(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided * * *.

[6] The court found that Lah had been acting for the debtor in obtaining the check, and that the bank had functioned solely as a conduit of the funds. App., *infra*, 48a-50a.

[7] In the district court's view, the "Swiss Haus" notation on the check put the IRS on "inquiry notice" that the transfer was voidable, since, at the time of receipt, the IRS had been notified of Nordic Village's bankruptcy filing. App., *infra*, 39a-40a, 43a-44a.

for the first time that the present action is barred by sovereign immunity. The court of appeals rejected both contentions over a dissent by Judge Kennedy.

a. Bankruptcy Code Section 106 waives the sovereign immunity of "governmental units" in bankruptcy cases under certain circumstances. The Code defines "governmental unit" to include the United States and agencies like the IRS, the States and their instrumentalities, and local and foreign governments.[8] The portion of Section 106 pertinent here is Section 106(c):

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. 106(c).[9]

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[8] 11 U.S.C. 101(26) provides:

"governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

[9] Sections 106(a) and 106(b) contain separate waivers of sovereign immunity, neither of which applies here. Section 106(a) waives the sovereign immunity of a "governmental unit" with respect to "any claim against such * * * unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's

In *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989), this Court held that Section 106(c) does not abrogate the immunity of States under the Eleventh Amendment from claims for retroactive monetary relief. Writing for a plurality, Justice White construed Section 106(c) "as not authorizing monetary recovery." *Hoffman*, 109 S. Ct. at 2823. He found that its language was, instead, "more indicative of declaratory and injunctive relief." *Ibid.*[10]

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claim arose." Under Section 106(a), when the government makes a claim against the estate, it waives its immunity from compulsory counterclaims by the estate. See S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978); cf. Fed. R. Civ. P. 13(a). Here, the IRS's claim against the estate was based on the debtor's tax delinquency; the trustee's claim against the IRS, in contrast, was based on the conversion of corporate funds by the debtor's officer to pay the officer's personal tax liability. There is no factual or legal connection between these two claims of the sort that triggers Section 106(a). See App., *infra*, 19a. Section 106(b) provides that, when the government makes a claim against the estate, the estate may seek to setoff against the government's claim any claim that the estate has against the government. Section 106(b) is inapplicable here because the trustee did not seek a setoff.

[10] Justice White was joined in *Hoffman* by the Chief Justice and Justices Kennedy and O'Connor. Justice Scalia concurred in a separate opinion in which Justice O'Connor also joined. 109 S. Ct. at 2824. Justice Scalia found it unnecessary to address the language of Section 106(c), because he determined that Congress lacks power under the Bankruptcy Clause of Article I to abrogate the States' Eleventh Amendment immunity. *Ibid.* Justice O'Connor also wrote separately, expressing her agreement with Justice Scalia and with the plurality's conclusion that in Section 106(c) Congress did not express "a clear intention to abrogate the States' Eleventh Amendment immunity." *Ibid.* Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun and

Hoffman involved a claim by a trustee in each of two, unrelated Chapter 7 proceedings. 109 S. Ct. at 2821. One of the claims was similar to respondent's claim in the present case; Hoffman sought to avoid a preferential payment to the taxing authority (there, the State), and to recover the payment pursuant to Section 550. *Ibid.*[11] The other claim was for the "turnover" (see 11 U.S.C. 542(b)) to the estate of money owed to the debtor by the State's Medicaid agency. *Ibid.* After the bankruptcy court in *Hoffman* upheld both claims, the United States intervened.

In a brief filed with this Court in *Hoffman*, the United States urged the interpretation of Section 106(c) ultimately adopted by the plurality. U.S. Br. in *Hoffman*, No. 88-412, at 10-26. The United States also made clear its position that "Congress treated federal and state agencies identically in Section 106(c)" (*id.* at 17-18), and that Section 106(c) therefore "must be construed to have the same mean-

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Stevens joined, stating that Congress did intend in Section 106(c) to abrogate the States' Eleventh Amendment immunity and that Congress had the authority to do so under the Bankruptcy Clause. *Id.* at 2824-2827. Finally, Justice Stevens, joined by Justice Blackmun, filed a dissent stating that he joined Justice Marshall's dissenting opinion and that, in his view, the legislative history of Section 106(c) "lends added support to [Justice Marshall's] reading of the statute." *Id.* at 2827-2829.

[11] As explained, in the present case the transfer was voidable under 549 of the Code. In *Hoffman*, the basis for avoiding the transfer was Section 547(b) of the Code. 109 S. Ct. at 2821. However, the statutory basis for recovery is the same in each case: both transfers avoided under 547(b) and transfers avoided under Section 549 are recoverable pursuant to Section 550(a) of the Code.

ing with respect to both state and federal agencies" (*id.* at 23 n.16). Although the Court had no occasion in *Hoffman* to address that position directly, the plurality noted that "[S]ection [106] applies to the Federal Government as well" as the States (109 S. Ct. at 2823), and Justice Stevens observed in his dissent that "[t]he statute * * * applies to the Federal Government as well" as to the States (109 alike" (*id.* at 2829).

In the wake of *Hoffman* and prior to the present case, only one court of appeals had addressed the scope of Section 106(c) in the context of a claim against the federal government. In *SBA* v. *Rinehart*, 887 F.2d 165, 170 (1989), the Eighth Circuit relied on the plurality opinion in *Hoffman* to conclude that Section 106(c) does not waive the federal government's sovereign immunity from claims for retroactive monetary relief.

b. The Sixth Circuit reached the opposite conclusion here in affirming the district court's judgment. The Sixth Circuit dismissed *Rinehart* as "suspect * * * authority" because the *Rinehart* court "assume[d] that *Hoffman* applies to the United States." App., *infra*, 7a n.2. The Sixth Circuit observed that "there [was] no controlling analysis of [Section 106(c)] in *Hoffman*" (*id.* at 3a), and the court believed that, in any event, "*Hoffman* is not precedent for this case" (*id.* at 10a) because the plurality "did not examine the intent of Congress as to federal agencies like the IRS" (*ibid.*). This state of affairs left "the lower courts [to] make independent judgments as to whether Congress intended, by the Bankruptcy Act, to waive the immunity of federal agencies, in this case, the IRS." *Id.* at 11a-12a.

In the Sixth Circuit's judgment, Section 106(c) waives the immunity of federal agencies from monetary recovery "in clear and explicit terms" (App., *infra*, 13a):

> Section 106 abolishes the defense of sovereign immunity in cases where the claim is made by the trustee pursuant to a provision of the Code that contains any of the words "creditor," "entity," or "governmental unit." Section 550 is one of these sections. It specifically authorizes the Trustee to avoid the transfer and to recover the property or its value from the "entity" for whose benefit the transfer is made. * * * The IRS is a "governmental unit" and an "entity," thus the language of the statute in this case clearly waives the governmental immunity.

App., *infra*, 6a. In contrast to the plurality in *Hoffman*, the court of appeals here found "nothing in the provision suggesting that it is limited to injunctive or declaratory relief." *Id.* at 6a-7a. Likewise eschewing the *Hoffman* plurality's exclusive reliance on statutory language, the court found support for its reading of Section 106 in the legislative history of the Bankruptcy Code.[12]

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[12] The court of appeals considered the case before it to present "a simple case involving the construction of language enacted by Congress." App., *infra*, 12a. Based on this view, the court examined the legislative history of Section 106(c) at some length. *Id.* at 7a-10a. The court noted that the *Hoffman* plurality refused to examine legislative history, insisting instead (109 S. Ct. at 2822) that the abrogation of immunity be expressed on the face of the statute. App., *infra*, 12a. *Hoffman*'s approach was "inapplicable" in the present case, the court explained, beacuse cases involving the federal government's sovereign immunity "are very different" from those involving the sovereign immunity of the States. *Ibid.*

The court acknowledged, but dismissed as irrelevant, the fact that its reading of Section 106 "w[ould] result in different meanings depending upon whether it is being applied to a state or federal governmental unit." App., *infra*, 12a. This was no anomaly, the court stated; rather, it was "the inevitable result of applying two different methods of construction." *Ibid.*

c. Judge Kennedy in dissent concluded that the analysis in *Hoffman* does apply to the United States. "[F]or essentially the same reasons relied upon by the plurality in * * * *Hoffman*" (App., *infra*, at 22a) she determined that "when reading the language narrowly in favor of the government, as [courts] are required to do, * * * the language of subsection 106(c) only waives sovereign immunity for the purpose of allowing a bankruptcy court to issue declaratory and injunctive relief." *Ibid.* Judge Kennedy expressed doubt about relying on legislative history as an aid to interpretation in this context. *Id.* at 22a n.4.[13] She nonetheless reviewed those portions of the legislative history on which the majority had relied, and concluded that they did not "produce an outcome different from that reached by a plurality of the Supreme Court [in *Hoffman*]." *Id.* at 22a.

REASONS FOR GRANTING THE PETITION

In *Hoffman*, this Court granted review "to resolve the conflict" among the circuits over the extent to which Bankruptcy Code Section 106(c) abrogates the sovereign immunity of the States under the Eleventh

[13] Judge Kennedy reasoned that, "[s]ince Congress intended the language we are interpreting to be applied in the same fashion to both state and federal governmental units, a resort to legislative history may well be inappropriate." App., *infra*, 22a n.4.

Amendment. 109 S. Ct. at 2822. The present case raises an issue of equal importance—namely, the extent to which Section 106(c) waives the sovereign immunity of the federal government—as to which the courts of appeals are divided. The Sixth Circuit's holding in the present case—that Section 106(c) waives the United States' immunity from retroactive monetary relief—directly conflicts with the Eighth Circuit's decision in *SBA* v. *Rinehart*, 887 F.2d 165 (1989), and with the interpretation of Section 106(c) adopted by a plurality of this Court in *Hoffman*. The Sixth Circuit's decision is incorrect in our view. Moreover, the decision exposes the United States to significant monetary liability under a wide variety of Bankruptcy Code provisions. For these reasons we urge the Court to grant review.

1. The Sixth Circuit correctly observed that no interpretation of Section 106(c) commanded majority support in *Hoffman*. Moreover, the Court had no occasion in *Hoffman* directly to address the scope of federal sovereign immunity under Section 106(c). The question left open in *Hoffman* has produced a conflict between the Sixth and the Eighth Circuits that warrants resolution by this Court.

In *SBA* v. *Rinehart*, *supra*, the Eighth Circuit reversed a district court's award of punitive damages against the Small Business Administration for a violation of the Code's automatic stay provision, 11 U.S.C. 362(a). The Eighth Circuit held that the award was barred by sovereign immunity. 887 F.2d at 166-167. In so holding, the court relied on the plurality opinion in *Hoffman* to determine that "section 106(c) * * * d[id] not authorize the award." *Id.* at 166. The *Rinehart* court recognized that the "precise question" before it was not decided in *Hoff-*

man. Nonetheless, the *Rinehart* court observed, "the Court's opinion [in *Hoffman*] refers to the federal government as well," and accordingly concluded that "[*Hoffman*'s] analysis is equally applicable to a waiver of sovereign immunity by the federal government." *Id.* at 170 (citing *Hoffman*, 109 S. Ct. at 2823).[14]

The Sixth Circuit here took the opposite approach. The Sixth Circuit determined that "[t]he more pertinent argument to the present case is that of the [dissenting] opinion [in *Hoffman*]." App., *infra*, 13a. Relying on the dissent in *Hoffman*, the court here concluded that the language of Section 106(c) "could not be clearer" and, in particular, contained "nothing * * * suggesting that it is limited to injunctive or declaratory relief." *Id.* at 6a-7a. The court below likewise embraced the analysis of legislative history set forth in the dissenting opinion in *Hoffman*, finding that the legislative history confirmed the court's reading of Section 106(c). *Id.* at 13a.

The conflicting interpretations of the Sixth and the Eighth Circuits subject the federal government to drastically different degrees and forms of liability. Under the Sixth Circuit's reading, the United States confronts claims for monetary recovery pursuant to a wide variety of Code provisions: "[T]he only limit is the number of provisions of the Bankruptcy Code

[14] The Ninth Circuit likewise concluded in a recent decision that "the plurality's reasoning [in *Hoffman*] is equally applicable to the immunity of the United States." *Pearson* v. *United States*, 917 F.2d 1215, 1216 (1990) (holding that Section 106(c) does not waive federal sovereign immunity from claims for money damages based on violations of the automatic stay provision of the Code, 11 U.S.C. 362), petition for cert. pending, No. 90-1208.

containing one of the trigger words. With this 'limit,' § 106(c) would apply in a scattershot fashion to over 100 Code provisions." *Hoffman*, 109 S. Ct. at 2822.[15] In contrast, under the Eighth Circuit's interpretation in *Rinehart*, Section 106(c) would, in general, authorize only declaratory or injunctive relief regarding the validity and dischargeability of debts owed to the government. See U.S. Br. in *Hoffman* at 14, 20-21.

Because of the broad legal consequences of the Sixth Circuit's decision and the United States' frequent position as a creditor in bankruptcy proceedings, the present conflict creates uncertainty in a significant portion of bankruptcy cases. Resolution of the conflict is therefore necessary to the effective administration of the Bankruptcy Code.

2. a. The Sixth Circuit eschewed the narrower interpretation of Section 106(c) adopted by a plurality of the Court in *Hoffman* in favor of the broader interpretation set forth in Justice Marshall's dissent. The court of appeals considered this choice to be compelled by the *Hoffman* plurality's invocation of *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court stated that, in abrogating the States' sovereign immunity under the Eleventh Amendment, Congress must make its intention "unmistakably clear in the language of the statute." 473 U.S. at 242. Since the *Atascadero* standard does not apply to waivers of federal sovereign immunity, the

[15] The Sixth Circuit's interpretation would authorize monetary awards not only for claims to recover post-petition transfers avoided under Section 549, as involved here, also—as involved in *Hoffman*, for example (see 109 S. Ct. at 2821)—claims to recover pre-petition preferential transfers avoided under Section 547 and claims for the "turnover" of funds.

court of appeals reasoned, it was free to treat the scope of the United States' immunity under Section 106(c) as a "simple" question of statutory interpretation. That conclusion conflicts both with this Court's decisions regarding the proper framework for analyzing questions of federal sovereign immunity and with Congress's intent as to Section 106(c).

Questions of federal sovereign immunity do not, as the Sixth Circuit believed, entail a "very different" (App., *infra*, 12a) analysis from the analysis that governs questions of Eleventh Amendment immunity. Like an intent to abrogate Eleventh Amendment immunity, Congress's intent to waive federal sovereign immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990). Accord *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969).[16] Statutes waiving federal sovereign immunity must be construed "strictly in favor of the sovereign" (*Testan*, 424 U.S. at 399), especially in matters affecting the federal fisc, see *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981). The Sixth Circuit ignored these settled principles when it treated the question presented here like any other question of congressional intent.

Congress intended in Section 106(c) to treat the States and the United States the same. Congress made this intention clear in Section 106(c) by using

[16] See also *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (interest on attorneys' fees cannot be recovered in Title VII action against the United States); cf. *Missouri* v. *Jenkins*, 491 U.S. 274, 281 n.3 (1989) (interest on attorneys' fees available in Title VII action against a State).

a single term, "governmental unit," to refer to both the States and the United States. Since Congress intended to accord identical tratment, courts should also accord identical treatment in construing Section 106(c). Thus, the Sixth Circuit should have applied the same analysis to the United States' claim of immunity as this Court did to the State's claim in *Hoffman*. The court should have determined whether an intent to waive federal sovereign immunity from monetary recovery was "unmistakably clear in the language of the statute." *Hoffman*, 109 S. Ct. at 2822.

The court of appeals erred not only in its approach to the language of Section 106(c) but also in its reliance on legislative history. "Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (quoted in *Hoffman*, 109 S. Ct. at 2822). "If congressional intent is unmistakably clear in the language of the statute, reliance on [legislative history] will be unnecessary, and if it is not, *Atascadero* will not be satisfied." *Hoffman*, 109 S. Ct. at 2823. Relying on *Dellmuth* and *Atascadero*, the plurality in *Hoffman* refused to review the legislative history of Section 106(c) to determine the scope of the States' immunity. Because Congress intended the States and the United States to be treated the same, the Sixth Circuit here should not have relied on legislative history to determine the scope of federal sovereign immunity.

b. The Sixth Circuit's analysis is flawed even if the scope of federal sovereign immunity under Section 106(c) presented a "simple" question of statutory interpretation. The court ignored established principles

of statutory construction in holding that Section 106(c) authorizes retroactive monetary relief. That is so, as Judge Kennedy stated, "for essentially the same reasons relied upon by the plurality * * * in *Hoffman*." App. 22a.

The Sixth Circuit's reading focuses solely on Section 106(c)(1) and ignores Section 106(c)(2). Under Section 106(c)(1), any Code provision that contains one of three trigger words applies to a governmental unit. The Sixth Circuit's analysis stopped after the court found one of the magic words in Section 550(a), the provision governing recovery of the transfer avoided here. On this basis, the court concluded that Section 106(c) waived sovereign immunity from monetary recovery. The court found "nothing in [Section 106(c)] suggesting that it is limited to injunctive or declaratory relief." App., *infra*, 6a-7a. That is because the court ignored Section 106(c)(2). Under this approach, as the plurality observed in *Hoffman*, Section 106(c) "would have exactly the same effect if subsection (c)(2) had been totally omitted." 109 S. Ct. at 2823. The Sixth Circuit's reading thus contravenes the duty of courts "to give effect, if possible, to every word and clause of a statute." *Ibid.*

Subsection (c)(2) contains "limiting language" that "is more indicative of declaratory and injunctive relief than of monetary recovery." *Hoffman*, 109 S. Ct. at 2823. The language restricts the relief available under Section 106(c) to a "determination by the court of [the] issue arising under" the Code provision that applies by operation of subsection (c)(1). Congress's use of the term "determination" stands in stark contrast to its use of the broader term "claim" used in Sections 106(a) and 106(b). The latter term, defined for purposes of the Code as a "right to payment" (11 U.S.C. 101(4)(A))—clearly authorizes monetary recovery in cases to which Section 106(a) or 106(b) applies. Congress's use of a different, plainly narrower term in Section 106(c) strongly suggests that Congress intended in that provision to restrict the form of relief available. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Another aspect of Sections 106(a) and 106(b) reinforces this understanding of Congress's intent. Sections 106(a) and 106(b) are narrow waivers of sovereign immunity. Most significantly, they apply only when the government has made a claim against the estate.[17] Thus, the government can avoid liability under Sections 106(a) and 106(b) by refraining from making a claim against the estate. The government does not have this option under Section 106(c); it applies whether or not the government has made a claim. Given the comparative *breadth* of Section 106(c) in this respect, the structure of Section 106 suggests that Section 106(c) should be comparatively *narrow* in terms of the form of relief it authorizes courts to grant.

As the plurality recognized in *Hoffman*, construing Section 106(c) to authorize only declaratory or injunctive relief does not deny all effect to that provision. So construed, Section 106(c) "waives the sovereign immunity of the Federal Government so that the Federal Government is bound by determinations of issues by the bankruptcy courts even when it did not appear and subject itself to the jurisdiction of such

[17] As explained, Section 106(a) authorizes claims against the government that arise out of the same transaction or occurrence as the government's claims against the estate. Section 106(b) allows claims of the estate to be setoff against the government's claims against the estate.

courts." *Hoffman*, 109 S. Ct. at 2823. Thus, the United States "would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes." *Ibid.*[18]

3. In *Hoffman*, the Court resolved the scope of the States' Eleventh Amendment immunity under Section 106(c). But the Court in *Hoffman* did not resolve the scope of immunity enjoyed by other "governmental unit[s]," because no interpretation of Section 106(c) commanded majority support. As noted, note 8, *supra*, "governmental units" in Section 106 include not only the States and the United States but also local and foreign governments. Thus, the current conflict between the Sixth and Eighth Circuits as to the scope of the United States' sovereign immunity under Section 106(c) also creates uncertainty for local and foreign governments. If the Court grants review of the question of federal sovereign immunity presented here, its decision is very likely to resolve the current uncertainty with regard to these other sovereign entities.

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[18] See also *Neavear* v. *Schweiker*, 674 F.2d 1201, 1203-1204 (7th Cir. 1982) (holding that, under Section 106(c), bankruptcy court could discharge debt owed to Social Security Administration), cited with approval in *Hoffman*, 109 S. Ct. at 2823.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-3656

IN RE: NORDIC VILLAGE, INC., DEBTOR

INTERNAL REVENUE SERVICE, PLAINTIFF-APPELLANT

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE,
DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed October 4, 1990

Before: KENNEDY and WELLFORD, Circuit Judges; and JOINER, Senior District Judge.*

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* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

JOINER, Senior District Judge, delivered the opinion of the court, in which WELLFORD, Circuit Judge, joined.

KENNEDY, Circuit Judge, (pp. 16-32) delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. The Internal Revenue Service (IRS) appeals from the district court's determination that it is liable to the trustee in bankruptcy of defendant, Nordic Village, Inc. (Nordic), for a voidable transfer under section 549 of the Bankruptcy Code, 11 U.S.C. section 549. The facts are stipulated. Nordic filed a Chapter 11 petition on March 27, 1984, pursuant to which Nordic acted as debtor-in-possession. On July 18, 1984, Josef Lah, an officer and shareholder of Nordic (then doing business as Swiss Haus, Inc.), drew a $26,000 counter-check on the corporate account made payable to the bank. The bank, in turn, issued several cashier's checks to Lah. The cashier's check at issue here, for $20,000, was made payable to the IRS.

The check bore the notation "REMITTER: SWISS HAUS, INC." At some point, a line was drawn through this notation, although it remains clearly legible. Lah delivered the cashier's check to the IRS, with instructions that it be credited against the outstanding tax liabilities of Josef Lah, doing business as Josef's Hair Design. The IRS credited Lah's account accordingly.

On August 10, 1984, a trustee in bankruptcy was appointed for Nordic. The trustee subsequently initiated a proceeding to recover several unauthorized post-petition transfers, including the transfer to the IRS. The bankruptcy court held that the transfer

was voidable under section 549 of the Bankruptcy Code, and that the IRS was the initial transferee of the debtor under section 550 of the Bankruptcy Code, 11 U.S.C. section 550 (1979 & Supp. 1990), because Lah was acting as the agent of the debtor when he withdrew the funds from the corporate account. The district court affirmed, but as to the latter issue, it also held in the alternative that the IRS was an immediate transferee, and knew or should have known that the transfer was voidable as a consequence of the notation "REMITTER: SWISS HAUS, INC." We now affirm.

I.

This case presents two issues for review. The first issue is the jurisdictional question of whether a federal agency has sovereign immunity under the Bankruptcy Code. The IRS relies upon *Hoffman* v. *Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989), in which the Supreme Court held that the sovereign immunity provision of the Bankruptcy Code, 11 U.S.C. section 106 (1979), does not waive the immunity of the states as to money judgments.[1] For three reasons, this reliance is misplaced.

First, there is no controlling analysis of the statute in *Hoffman*. Four Justices agreed that section 106 did not waive the immunity of states, in an opinion by Justice White, and in an opinion written by Justice Marshall, an equal number of Justices held to the

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[1] We note that certain other courts of appeals have found, as the IRS argues here, that *Hoffman* is controlling precedent on the issue of waiver of the federal sovereign immunity in bankruptcy actions. *See, e.g., Small Business Admin. v. Rinehart*, 887 F.2d 165 (8th Cir. 1989); *Tennessee v. Arizona State Retirement Sys.*, 873 F.2d 1400 (11th Cir. 1989).

contrary. The deciding vote in the case was delivered by Justice Scalia, concurring in the judgment on other grounds, and explicitly stating that he did not concur in the theory expanded upon in the opinion of Justice White. Thus, the most that can be said for the status of the *Hoffman* decision as precedent is that each of two theories received equal support.

Second, the holding in *Hoffman* is distinguishable because it dealt with the immunity of states under the eleventh amendment. The White opinion did not address whether Congress intended to waive the immunity of the United States, but instead decided the case by application of the rule that a congressional abrogation of the sovereign immunity of the states will not be found minus an explicit statement of Congress's intent to do so on the face of the statute. 109 S. Ct. at 2822. Here, we are dealing with a congressional waiver of the sovereign immunity of the United States.

Third, the legislative history supports the plain language of section 106 and the reasoning of the Marshall opinion in *Hoffman*, which pointed out that it was the intention of Congress to waive sovereign immunity in cases like *Hoffman*, and like the case presently before us. The only clear parsing of the statute having any application to this case is done by Justice Marshall.

This case also presents the issue of the liability of a transferee in the circumstances surrounding the IRS's receipt of Lah's check. The district court was correct in holding, alternatively, against the IRS's claim that the funds were taken in good faith and without knowledge that they were funds belonging to Swiss Haus, Inc., the transfer of which was voidable.

II. Waiver of Sovereign Immunity

A. Intent of Congress

The jurisdiction of the court turns on the waiver by Congress of the IRS's sovereign immunity. Two provisions of the Bankruptcy Code are relevant. Section 550 provides, in part:

> (a) Except as otherwise provided, in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee or such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from—
>
> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided . . . .

11 U.S.C. § 550. Section 106 of the Bankruptcy Code provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the

same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsection (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 106. Section 106 abolishes the defense of sovereign immunity in cases where the claim is made by the trustee pursuant to a provision of the Code that contains any of the words "creditor," "entity," or "governmental unit." Section 550 is one of these sections. It specifically authorizes the Trustee to avoid the transfer and to recover the property or its value from the "entity" for whose benefit the transfer was made.

Sections 550 and 106 authorize suits by the trustee to recover a transfer of the type involved here from the IRS regardless of sovereign immunity. In this case, the IRS received the "benefit" of the check. The IRS is a "governmental unit" and an "entity," thus, the language of the statute in this case clearly waives the governmental immunity.

Section 106 is a straight-forward and specific waiver of sovereign immunity as it relates to federal governmental units. There is nothing in the provi-

sion suggesting that it is limited to injunctive or declaratory relief. The terms of the waiver take us to any provision of the Code using the trigger words. The meaning could not be clearer.

The legislative history of the Bankruptcy Code supports a plain-language reading of section 106.[2] The original draft of the Bankruptcy Code submitted by the Commission on the Bankruptcy Laws of the United States proposed the following waiver of sovereign immunity:

> All provisions of the Act shall apply to the United States and to every department, agency and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., Pt. II, at 1 (1973) (*reprinted in* COLLIER ON BANKRUPTCY, App. 2, § 1 (15th ed. 1984)).

The original House and Senate versions of current section 106 were identical and far narrower in scope, providing as follows:

> (a) A governmental unit that files a proof of claim under section 501 of this title is deemed to

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[2] The opinion in *Small Business Administration v. Rinehart*, 887 F.2d 165 (8th Cir. 1989), holding that the statute does not waive sovereign immunity as to punitive damages, does not consider the legislative history. It assumes that *Hoffman* applies to the United States and as such it is suspect as authority.

have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit for which such governmental unit filed a proof of claim or interest under section 501 of this title any claim against such governmental unit that is property of the estate.

H.R. 8200, 95th Cong., 1st Sess. 324 (1977); S. 2266, 95th Cong., 2d Sess. 313 (1978) (*reprinted in* COLLIER ON BANKRUPTCY, App. 3, §§ III, VII (15th ed. 1984)). The committee reports which accompanied this provision were also identical and indicative of the narrowness of the proposed provision. They stated in pertinent part:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waive sovereign immunity for the federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of bankruptcy estate [sic] against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit a State action that is contrary to bankruptcy policy.
>
> . . . .

> Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. § 501(c).
>
> This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against the sovereign.

H.R. Rep. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. 989, 95th Cong., 2d Sess. 29-30 (1978) (*reprinted in* COLLIER ON BANKRUPTCY, App. 2, § II; App. 3, § V (15th ed. 1984)).

Subsequently, the two identical proposed provisions on sovereign immunity, H.R. 8200 and S. 2266, were sent to the Conference Committee where sections 106(a) and 106(b) were reworded and where section 106(c) made its initial and permanent appearance. Although the Conference Committee did not issue a report, the floor managers of the legislation read into the Congressional Record identical statements explaining the Conference Committee's work. The statement on section 106(c) provided as follows:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in Title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirements in case law that an express waiver of sovereign immunity is re-

quired in order to be effective. Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during the bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and 106(b), subsection (c) is not limited to these issues, but permits a bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor-in-possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the House Report to H.R. 8200 is thereby overruled.

124 Cong. Rec. Rec. H11091 (Sept. 28, 1978) (comments of Mr. Edwards of California) (*reprinted in* COLLIER ON BANKRUPTCY, App. 3, § IX, at IX-90 (15th ed. 1984)); § S17307 (Oct. 6, 1978) (comments of Mr. DeConcini of Arizona) (*reprinted in* COLLIER ON BANKRUPTCY, App. 3, § X, at X-16 (15th ed. 1984)).

B. Hoffman

Hoffman is not precedent for this case. The Justices joining in the White opinion based their conclusion on an eleventh amendment analysis, holding that the eleventh amendment immunity of states was not breached by the language of the waiver provision. These Justices did not examine the intent of Congress as to federal agencies like the IRS. They did not examine the legislative history at all. In fact, they did not decide this case. The judgment in *Hoffman*

was reached only because Justice Scalia would hold, not that Congress did *not* abrogate the states' eleventh amendment immunity, but that it does not have the power to do so. Justice O'Connor agreed.

The opinion of the other four Justices supports the analysis of this court in this case. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dealt squarely with the language of section 106 and found it sufficiently broad and compelling to overcome the immunity which the eleventh amendment grants to the states. They explicitly rejected the conclusion of the other four Justices that the statute would permit suits only for injunctive and declaratory relief.

Hoffman is authority for the fact that the states cannot be sued under the Bankruptcy Code due to a five-Justice combination of two theories, one finding no authority in Congress to waive the sovereign immunity of states, and the other holding that the Bankruptcy Code's waiver provision was not intended to waive the sovereign immunity of states. *Hoffman* does not establish that the Act was not broad enough or specific enough to waive immunity. Justice Scalia, who cast the tie-breaking vote, did not parse the statute, because the intent of Congress was irrelevant under his analysis. The four Justices joining the Marshall opinion held that the provision is sufficiently broad and specific to permit suits against the states. In sum, the case cannot be used to support a claim that Congress has not waived the governmental immunity of the United States, absent the strictures of the eleventh amendment. In a case such as the one presently before the court, the arguments of Justice Marshall have equal force with the arguments of Justice White, and the lower courts must make independent judgments as to whether Congress intended, by

the Bankruptcy Act, to waive the immunity of federal agencies, in this case, the IRS.

The foregoing discussion highlights the features which distinguish the *Hoffman* case from the case at bar. In this case, the issues do not involve the eleventh amendment, but simply raise the intent of Congress to waive sovereign immunity regarding claims against the IRS. These two cases are very different and involve different burdens and analyses.

The White opinion in *Hoffman*, urged upon us by the IRS, emphasized the heavy burden on a party asserting waiver of the eleventh amendment: "[T]o abrogate the States' Eleventh Amendment immunity . . . Congress must make its intention 'unmistakably clear in the language of the statute.'" *Hoffman*, 109 S. Ct. at 2822 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Addressing the probative value of the legislative history, the four Justices held that "'[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment.'" *Hoffman*, 109 S. Ct. at 2824. That holding is inapplicable to this case. This is a simple case involving the construction of language enacted by Congress, not a constitutional amendment relating to a fundamental concept of federalism. We do not have before us in this case issues relating to states' rights and central power and the various doctrines that have been developed to prevent overreaching by the federal government. The *Hoffman* case involves different values and thus, the analysis of that case was necessarily different than that called for here.

While it is true that our reading of section 106 will result in different meanings depending upon whether it is being applied to a state or federal governmental

unit, different meanings are an inevitable result of applying two different methods of construction, one dealing with a constitutional provision protecting our federal system, and the other simply determining the will of Congress to permit the federal government to be sued. The plaintiff's argument erroneously assumes that the *Hoffman* Court's holding that the states are immune to monetary recoveries was reached by the sole and inevitable construction of the provision. The *Hoffman* Court itself did not offer a single reading, but evenly divided between two. The more pertinent argument to the present case is that of the Marshall opinion.

In summary, the statute, in clear and explicit terms, prevents the IRS from asserting the defense of sovereign immunity. This is supported by the legislative history, as noted by the Marshall opinion in *Hoffman*. Having resolved the jurisdictional issue, we now turn to the merits of the trustee's recovery.

III. Right of Trustee to Recover

Section 549 of the Bankruptcy Code provides that the trustee may avoid a transfer not authorized by any provision of the Code, that occurs after the commencement of the case. In this case, the transfer was unauthorized, and all events took place after the filing of the bankruptcy action. Section 550(a) of the Bankruptcy Code provides that when, as here, the transfer is voidable, the trustee may recover for the benefit of the estate the property transferred or its value. The trustee may recover from the initial transferee, the entity for whose benefit the transfer was made, or any immediate or mediate transferee of such initial transferee. The chain of possible liable parties is interrupted only when a transferee takes for value,

in good faith and without knowledge of the voidable nature of the transfer. The requirement of "knowledge" is satisfied if the transferee "knew facts that would lead a reasonable person to believe that the property transferred was recoverable." *Smith v. Mixon*, 788 F.2d 229, 232 n.2 (4th Cir. 1986); *Robbins v. Robbins*, 91 Bankr. 879, 886 (Bankr. W.D. Mo. 1988).

In this case, the IRS was either the "initial transferee" or an "immediate . . . transferee of such initial transferee." If Lah is viewed as acting for Nordic, then the IRS is the "initial transferee."[3] If Lah is viewed as having taken money illegally from Nordic, he is the "initial transferee" and the delivery of the cashier's check to the IRS makes the IRS an "immediate transferee" of Lah, the "initial transferee." If the IRS is considered as an "immediate transferee" of Lah, the IRS can prevail if the IRS shows that it took for value, in good faith, and without knowledge of the voidability of the transfer.

In this case, since it is stipulated that the transfer is voidable, the trustee can recover from the IRS if the IRS is the "initial transferee," and can recover if the IRS is an "immediate transferee" of Lah, unless the IRS shows that it (1) took for value, (2) in good faith, and (3) without knowledge of the voidability of the transfer.

[3] As the IRS has not met its burden of showing that it took the check without knowledge of the voidability of the transfer, it is not essential to determine whether or not the IRS was an initial transferee. There is substantial support for the conclusion that when a corporate officer takes checks drawn from corporate funds to pay personal debts, the corporate officer, and not the payee on the check is the initial transferee. *Ross v. United States (In re Auto-Pak, Inc.)*, 73 Bankr. 52, 54 (D.D.C. 1987); *Still v. American Nat'l Bank & Trust Co. (In re Jorges Carpet Mills, Inc.)*, 50 Bankr. 84 (Bankr. E.D. Tenn. 1985).

The language of the statute clearly places the burden of showing value, good faith, and lack of knowledge, on the transferee as a defense. The way the statute is worded makes it clear that the trustee's right to recover is broad, by giving rights against not only the transferee, but also against transferees of the initial transferee. However, to prevent innocent third parties from being hurt by this broadly delineated right of recovery, the law gives them a defense if they show that they took for value, in good faith, and without knowledge of the voidability of the transfer.

Bankruptcy Rule 6001 states that "[a]ny entity asserting the validity of a transfer under section 549 of the Code shall have the burden of proof." While the present dispute arises under section 550, section 549(c) provides an identical exception for good faith purchasers of realty. If the IRS is to prevail, the facts must show that they have met the burden of proving the three required conditions—value, good faith, and lack of knowledge.

The stipulated facts shows that the check bore the notation "REMITTER: SWISS HAUS, INC.," which was the name under which the debtor was doing business. There is nothing in the record to indicate whether the notation was crossed out before or after the transfer to the IRS.

The IRS gave value for the check by crediting it against Lah's outstanding tax liability. However, because of the words "REMITTER: SWISS HAUS, INC.," it cannot be said that the IRS acted without knowledge of the voidability of the transfer. It is not an ordinary business practice for corporate enti-

ties to pay one another's taxes. This notation is sufficient to place a reasonable person on notice that the transfer was illegitimate, and by extension, that it was voidable. It is not apparent from the facts that the IRS had actual notice—that it did not accept the check in good faith—however, the facts give rise to an inference of inquiry notice. The IRS is a sizeable organization and its procedures for collecting taxes complicated, but there is nothing in size or complexity that should lessen the obligation to observe circumstances giving notice that something might be wrong with accepting a check. The IRS, in crediting Lah's tax liability with money belonging to Swiss Haus, Inc., has done nothing to cause prejudice to others except Swiss Haus, Inc. When, as here, the transferee does not meet the burden of proving value given, good faith, or lack of knowledge, the unwinding of the situation by requiring the return of the money to the Trustee takes away from no one anything to which that person is entitled. Holding that the Trustee may recover simply places all the parties in the position where they were before the wrongful transfer took place. In other words, there is nothing special about the IRS to cause us to relax the requirements of value, good faith, and lack of knowledge in situations such as this one, being unwound by the court.

IV.

Since the IRS cannot assert the defense of sovereign immunity, and since the IRS has not carried its burden of showing that it took without knowledge of the voidability of the transfer, the district court is AFFIRMED.

KENNEDY, Circuit Judge, dissenting. Because I believe that Congress has not clearly waived the sovereign immunity of the United States, I dissent.[1] In the alternative, I also believe that the majority errs in affirming the District Court's holding that the IRS acted other than in good faith and with knowledge.

The doctrine of sovereign immunity prohibits suits against the United States except in those instances in which it has specifically consented to be sued. Such waivers are to be narrowly construed. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141-42 (1972); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A purported waiver of sovereign immunity is to be read narrowly, with any ambiguity construed in favor of the United States. *See, e.g., United States v. Testan*, 424 U.S. 392, 399 (1976) ("a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed' ") (quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *McMahon v. United States*, 342 U.S. 25, 27 (1951) ("statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign"); *Sherwood*, 312 U.S. at 590 ("[t]he section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted"). The citations in Justice

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[1] The government has not waived its sovereign immunity argument by failing to raise it below since questions of sovereign immunity are jurisdictional and may be raised at any time. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940).

Stevens' dissent [2] in *Hoffman v. Connecticut Dep't. of Income Maintenance*, 109 S. Ct. 2818, 2829 (1989), which purportedly establish the rule that waivers of sovereign immunity are construed broadly, are not on point. These cases do not provide for a broad reading of waivers of sovereign immunity but for a narrow reading of limitations placed on an otherwise broad waiver. *See, e.g., Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-55 (1951). I do not believe the waiver at issue in this case falls within this framework since it is the terms of the waiver that are at issue, not the terms of a limitation placed upon a waiver.

The majority concludes that the United States has waived its immunity to this suit by enacting section 106 of the Bankruptcy Code, 11 U.S.C. § 106. Section 106 provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

[2] I refer to Justice White's opinion in *Hoffman*—which received the most votes of any opinion concurring in the judgment—as the "plurality" and Justice Marshall's and Stevens' opinion as dissenting for convenience, as did Justice Marshall in his dissenting opinion. *See Hoffman*, 109 S. Ct. at 2825-27.

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

It is undisputed that the term "governmental unit" as used in section 106 applies to the IRS. 11 U.S.C. § 106. It is also undisputed that this case does not fall within the scope of subsections 106(a) or (b). Subsection 106(a) is a very narrow waiver of sovereign immunity intended to cover only those claims of the estate that are compulsory counterclaims to a claim against the estate filed by the governmental unit. *In re Willington Convalescent Home, Inc.*, 850 F.2d 50, 54 (2d Cir. 1988), *aff'd sub nom. Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989); *WJM, Inc. v. Massachusetts Dep't of Pub. Welfare*, 840 F.2d 996, 1003 n.8 (1st Cir. 1988); S. Rep. No. 989, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5815. Here, the trustee's claim does not arise out of the IRS's claim against the debtor for the payment of taxes. Subsection 106(b) is also narrow in scope, waiving immunity only to provide an offset limited to the value of the governmental unit's allowed claim against the estate. *Willington*, 850 F.2d at 54; S. Rep. No. 989, *supra* at 29-30, *printed in* 1978 U.S. Code Cong. & Admin. News at 5787, 5815-16. Although subsection 106(b) may apply in this

case, the Bankruptcy Court's order is not limited to the value of the IRS's claim against the estate.

The parties agree that the United States has waived its sovereign immunity to this action, if at all, by its enactment of subsection 106(c). The trustee believes and the majority concludes that subsection 106(c) should be read to waive the federal government's sovereign immunity whenever a trustee brings a suit pursuant to a provision of the Bankruptcy Code that contains one of the words "creditor," "entity," or "governmental unit." The IRS argues that subsection 106(c) does not authorize the bankruptcy courts to enter a judgment for affirmative monetary recoveries against governmental entities but only allows them to make binding determinations of a government entity's rights in the debtor's estate.

The construction urged by the government is the same construction adopted by a plurality of the Supreme Court in *Hoffman*. The Court in *Hoffman* had before it the question of whether Congress waived the State's Eleventh Amendment sovereign immunity in subsection 106(c). Four members of the Court, in an opinion authored by Justice White, construed subsection 106(c) "as not authorizing monetary recovery from the States." *Hoffman*, 109 S. Ct. at 2823. Under this construction of subsection 106(c), "a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes, but would not be subjected to monetary recovery." *Id.* (citations omitted). Justice White's opinion was joined by Chief Justice Rehnquist, and Justices Kennedy and O'Connor. Justice Scalia filed a concurring opinion in which he expressed the belief that Congress had no power to abrogate the State's Eleventh Amendment immunity.

Id. at 2824.[3] Because he concluded that Congress had no power to abrogate the States' Eleventh Amendment sovereign immunity, he did not address the meaning of subsection 106(c). Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, and Justice Stevens, joined by Justice Blackmun, filed dissenting opinions expressing their belief that Congress had the power and had expressed the intent to abrogate the Eleventh Amendment sovereign immunity of the States. *Id.* at 2824, 2827.

The trustee argues and the majority concludes that we should not adopt the *Hoffman* plurality's construction of subsection 106(c) because the reasoning used to derive it is limited to the facts of the case. In cases involving the waiver of the States' Eleventh Amendment sovereign immunity, " '[l]egislative history generally will be irrelevant.' " *Id.* at 2824 (quoting *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989)). Thus the plurality limited its examination to the actual language of subsection 106(c), refusing to examine the legislative history.

In this case, the trustee believes that we should look not only to the language of subsection 106(c) in isolation, but also examine it in the context of other provisions of the Bankruptcy Code and in light of the legislative history. When determining whether the United States has waived its sovereign immunity there is no general prohibition on the examination of a statute in context or in light of its legislative his-

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[3] Justice O'Connor, in a concurring opinion, agreed with Justice Scalia that Congress could not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause, but believed that Congress had not expressed a clear intention to make the attempt. Accordingly, she joined the plurality opinion. *Hoffman*, 109 S. Ct. at 2824.

tory. *See, e.g., Federal Hous. Admin. v. Burr*, 309 U.S. 242, 247 (1940) (examining the legislative history of other recently created agencies to determine whether Congress intended to waive the FHA's sovereign immunity); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 394 (1939) (examining a statute "in its entire setting" when seeking to determine whether Congress has waived the sovereign immunity of a government corporation). Although I believe that the Court has the authority to examine the context and legislative history of subsection 106(c) as well as its language, I am not convinced, on balance, that such an examination produces an outcome different from that reached by a plurality of the Supreme Court.[4]

The language of the statute is not a model of clear, concise legislative drafting. Nevertheless, when reading the language narrowly in favor of the government, as we are required to do, I believe that the language of subsection 106(c) only waives sovereign immunity for the purpose of allowing a bankruptcy court to issue declaratory and injunctive relief.

I reach this conclusion for essentially the same reasons relied upon by the plurality of the Supreme Court and the Second Circuit in *Hoffman*. First, the words "determination by the court of an issue" used in subsection 106(c)(2) are both different and narrower in scope than the words "any claim" used in

[4] Since Congress intended the language we are interpreting to be applied in the same fashion to both state and federal governmental units, a resort to legislative history may well be inappropriate. Because I do not believe that the legislative history is a sufficiently clear expression of Congressional intent to waive sovereign immunity, I need not reach this issue, however.

subsections 106(a) and (b). *Hoffman*, 109 S. Ct. at 2822-23; *Willington Convalescent Home*, 850 F.2d at 54-55; *see also Tew v. Arizona State Retirement Sys.*, 873 F.2d 1400 (11th Cir. 1989) (adopting the Second Circuit's position in *Willington Convalescent Home*, as applied to the States' Eleventh Amendment sovereign immunity claim). The language of subsection 106(c) appears to be more in the nature of an authorization for declaratory relief than an authorization for an affirmative recovery.

Second, a contrary conclusion would render meaningless the language of subsection 106(c)(2). As has been often stated by the Supreme Court, "It is our duty 'to give effect, if possible, to every clause and word of a statute . . . .'" *United States v. Menasche*, 348 U.S. 528, 5 38-39 (1955) (quoting *Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Hoffman*, 109 S. Ct. at 2822-23. As did the plurality in *Hoffman*, I interpret the language in subsection 106(c)(2) to be a limitation on the scope of subsection 106(c), not a redundant statement declaring that governmental entities will be bound by the rulings subsection 106(c) authorizes the bankruptcy court to make. *Compare Hoffman*, 109 S. Ct. at 2822-23 (plurality opinion) *with Hoffman*, 109 S. Ct. at 2825 (Marshall, J., dissenting).

Third, the majority's reading results in subsection 106(c)—which speaks of the waiver of sovereign immunity for "governmental units"—having two completely different meanings depending on the governmental unit against which the trustee seeks to use it, a result surely never intended by Congress. The statute does not purport to draw distinctions between the treatment of state and federal governmental units, its provisions refer only to "governmental units."

Absent some affirmative statement by Congress, I cannot conclude that such an anomalous result was intended. The greater scrutiny given congressional waivers of the State's sovereign immunity than the United States' immunity is insufficient to support such a result. *Accord Small Business Admin. v. Rinehart*, 887 F.2d 165, 169-70 (8th Cir. 1989). Where the language applies equally to the waiver of the immunity of both state and federal governmental units, it is more appropriate to apply the higher standard of scrutiny.

I recognize, as pointed out by Justice Marshall, that subsection 106(c)(1) does not explicitly limit the waiver of sovereign immunity to those code provisions that contain trigger words *and* permit injunctive and monetary relief. *See Hoffman*, 109 S. Ct. at 2825. I do not believe that this creates a fatal flaw in the reasoning, however. It is not illogical for Congress to provide for such a limitation in subsection 106(c)(2) rather than in each individual section that contains a provision allowing for monetary damages. At the very least, I do not believe the tension in the statute created by this reading is any greater than the tension created by reading subsection 106(c)(2) out of the statute, which results from the majority's interpretation.

Finally, my examination of the statutory history does not lead me to a different result as it does the majority. The original versions of section 106 passed by the House and Senate did not contain a provision analogous to subsection 106(c). The Conference Committee that produced the final version of section 106 containing the provision did not produce a conference committee report. Instead, the floor managers of the legislation read into the Congressional Record identi-

cal statements explaining the Conference Committee's work. The statement on subsection 106(c) provided:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title II applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir. 1975), and in re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106 (a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

124 Cong. Rec. H32,394 (daily ed. Sept. 28, 1978) (comments of Rep. Edwards); 124 Cong. Rec. S33,993 (daily ed. Oct. 5, 1978) (comments of Sen. DeConcini).[5]

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[5] Due to the constraints in time in passing the Bankruptcy Reform Act of 1978, there was no conference report to recon-

The majority and the trustee, relying particularly on the last sentence, read this statement as evidence that Congress clearly intended to waive the sovereign immunity of the United States when an action is filed by the trustee under any section containing a trigger word. The government reads this statement more narrowly, emphasizing the statement's reference to *Gwilliam v. United States (In re Gwilliam)*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975). These two cases held that under a provision of the former Bankruptcy Code, bankruptcy courts had the jurisdiction to determine the amount or legality of any unpaid tax of the debtor or the bankrupt estate. The government believes the language indicating that "subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well" should be read only to allow injunctive and declaratory actions on nontax issues that are similar to those endorsed for tax issues in *Gwilliam* and *Dolard*. *Accord Willington Convalescent Home*, 850 F.2d at 55-56.

As to the final sentence of the statement, the government admits it may lend some support to the trustee's position, but asserts its ambiguity should be read in favor of the government. Accordingly, the government would read the last sentence as authoriz-

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cile the differences between the House and Senate bills. Instead Representative Edwards and Senator DeConcini made oral reports to Congress on the results of the conference. *See* 124 Cong. Rec. H32,391 (1978) (statement of Rep. Rousselot); 124 Cong. Rec. H32,392 (1978) (statement of Rep. Edwards); 124 Cong. Rec. S33992 (1978) (statement of Sen. DeConcini). The Supreme Court has treated these floor statements as "persuasive evidence of congressional intent." *Beiger v. IRS*, 110 S. Ct. 2258, 2266 n.5 (1990).

ing actions by a bankruptcy court where the debtor has a possessory or ownership interest in property that the trustee seeks to include in the estate. As an example, the government cites *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). In that case, the IRS had seized a company's tangible assets to satisfy a tax liability but had not yet sold them. Under those circumstances, the Supreme Court held that the trustee could avoid the seizure and recover the assets since the debtor retained ownership of the property until it was sold. The IRS was entitled only to the security provided by its lien on the property. *Id.* at 211. The trustee counters that cases such as *Whiting Pools*, which arise under 11 U.S.C. § 542, technically do not involve the "avoiding powers" of the Bankruptcy Code. Therefore, the trustee asserts this is not a possible meaning of the last sentence of the statement.

Although the final sentence of the joint statement on section 106 does lend support to the majority's position, I believe that the congressional statements taken as a whole are not sufficiently clear to override the mandate of the Supreme Court to construe provisions concerning the waiver of the sovereign immunity "strictly in favor of the sovereign." *McMahon*, 342 U.S. at 27. Since both the statutory language and the legislative history are capable of a narrower reading, it is this reading to which we should give effect.

The trustee also seeks to bolster his position by reference to the legislative history of 11 U.S.C. § 547(b)(2). Subsection 547(b)(2) allows the trustee to avoid certain prepetition transfers of property by the debtor to a creditor that were made "for or on account of an antecedent debt owed by the debtor before

such transfer was made." The original Senate version of the bill specifically exempted payments of tax debts. The Conference Committee adopted the House version of this provision, however. The joint explanatory statement noted the effect of this choice:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

124 Cong. Rec. H32400 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S34,000 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini).

This statement contains the strongest evidence that Congress intended to waive its sovereign immunity to suit. When read in light of the entire legislative history even this language does not fully resolve all doubts. The original committee reports explain that section 550 "enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee." S. Rep. No. 989, 95th Cong., 2d Sess. 90 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5876, 6331. Our concern here is not with the avoidance determination but with the question of whether the trustee can recover the funds from the IRS once the transfer is avoided. Read in context, the language cited by the trustee may only

authorize bankruptcy courts to make the avoidance determination, not order recovery from the government. For the purpose of this case, I do not decide the precise effect of this language. I only conclude that this one statement is not sufficient, standing alone, to override the ambiguities in the language of subsection 106(c).[6]

The IRS as a Good Faith Subsequent Transferee Without Knowledge

The majority reaches no conclusion as to whether the IRS is an initial trustee [*sic*] or a subsequent transferee within the meaning of 11 U.S.C. § 550(a)(1). It affirms the District Court's holding that even if an immediate transferee, it should have known the transfer was voidable as a consequence of the notation "REMITTER: SWISS HAUS, INC." Because of my conclusion that the federal government has not waived its sovereign immunity, I am not required to reach these questions. Nevertheless, I do so because I believe the majority has erred in its conclu-

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[6] The IRS argues that because this case arises in the first instance under § 549, which does not contain one of the trigger words listed in § 106(c)(1), the case does not qualify under § 106. Subsection 550(a), under which the trustee is authorized to bring an action to recover the property, does contain such triggering language, but provides that property may only be recovered "to the extent that a transfer is avoided under section . . . 549." Because of my disposition of the sovereign immunity question, I need not decide whether it is sufficient that § 550(a) contain one of the trigger words. Further, I note that the order for payment—the act that offends sovereign immunity—is made under § 550(a). The determination under § 549 is merely a declaration of the type endorsed by my reading of § 106(c).

sion that the IRS acted in bad faith and with knowledge of the transaction's voidability. The trustee may recover property from "the initial transferee of such transfer or the entity for whose benefit such transfer was made" without limitation. 11 U.S.C. § 550 (a)(1). However, the trustee cannot recover from a subsequent transferee "that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided. . . ." 11 U.S.C. § 550(b)(1).

The District Court, adopting the Bankruptcy Court's resolution of the issue, held that the IRS was an initial transferee under subsection 550(a)(1) because "[t]he debtor or at least its agent, procured the official bank check and delivered it to the Internal Revenue Service." Joint App. at 39. The trustee and the IRS had submitted the matter to the Bankruptcy Court on stipulated facts and briefs. The stipulations do not make clear the circumstances under which Lah delivered the check to the IRS. While there was an indication that the IRS had notice that Nordic Village had filed for bankruptcy protection as of the time it accepted the check, there is no indication that the person or persons who accepted the check knew or should have known of the bankruptcy filing or knew or should have known that Nordic Village did business as Swiss Haus. In the alternative, the District Court held that even if the IRS was a subsequent transferee, it did not cancel the debt in good faith. The court reasoned that because the IRS had notice of Nordic Village's bankruptcy filing, and because the check contained the notation "REMITTER: SWISS HAUS, INC.," the IRS was required to investigate the source of the check.

The clearest articulation of the test for when an individual or institution becomes a transferee is contained in *Bonded Fin. Serv's, Inc. v. European Am. Bank*, 838 F.2d 890 (7th Cir. 1988). One of the issues facing the court in *Bonded Financial* was whether a bank becomes an initial transferee by cashing a check from the debtor corporation and, as per the instructions accompanying the check, depositing it in the account of a corporate officer of the debtor. The court held the bank's actions did not give it the status of a transferee and concluded the bank was a mere "financial intermediary" to the transaction. *Id.* at 893. The court reasoned "[T]he minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes." *Id.* Though the language could be read more narrowly, I believe that the Seventh Circuit intended to cover two situations: (1) those where the person had the legal and equitable right to put the money to his own uses and (2) those where the person had the intent and ability to do so even if the "right" to do so is, in a legal sense, lacking. It is this interpretation that I would apply in this case.

In this case, Lah does not fall into the first category. He lacked both the legal and equitable right to make the transfer. It is difficult from the stipulated facts to determine whether Lah's possession of the funds falls into the second category. However, I do not believe the District Court was correct in holding that because Lah used his authority as a corporate officer to cash a counter check, the transfer was from the corporation to the IRS.[7] To so hold would estab-

[7] I agree with the holdings below and decision of the Seventh Circuit in *Bonded Financial* that the bank, Ameri-Trust,

lish a rule that no person who receives embezzled property directly from an embezzler could ever be a good faith purchaser for value and without notice. Instead, I believe the question turns on the degree of control Lah exercised over the funds when he cashed the counter check. If the bank would have given Lah cash or issued a cashier's check to anyone of Lah's choosing, it is clear that Lah would have been the initial transferee because he would have had the intent and ability to put the money to his own use. *See Ross v. United States (In re Auto-Pak, Inc.)*, 73 Bankr. 52 (D.D.C. 1987); *Stills v. American Nat'l Bank & Trust Co. (In re Jorges Carpet Mills, Inc.)*, 50 Bankr. 84 (Bankr. E.D. Tenn. 1985). Note that Lah bought other cashier's checks as well, according to the stipulated facts. In contrast, if the bank allowed Lah to cash the counter check only because the proceeds were to be used to purchase a cashier's check payable to the IRS, then Lah possessed only a limited ability to control the funds. Such limited control is an insufficient basis to conclude that Lah is a transferee.[8]

Even if it is impossible to tell from the stipulation of facts agreed to by the parties which situation this

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is not a transferee, but merely a "financial intermediary." *Bonded Financial*, 838 F.2d at 893.

[8] I do not think it is sufficient that Lah had the ability to direct the IRS to apply the cashier's check to his personal tax liability. Lah must have the ability to control who is to receive the funds, not just who will receive the benefit of the payment. This latter situation is too closely analogous to a case where the debtor sends a check directly to the IRS with instruction that the IRS credit Lah's account. In that instance, the IRS would be the initial transferee and Lah would be the entity for whose benefit the transfer was intended.

case most closely resembles, this cannot aid the trustee. It is the trustee who bears the initial burden of proving that a transfer occurred and that the IRS is the initial transferee. *See, e.g., In re Closson*, 100 Bankr. 345, 347-48 (Bankr. S.D. Ohio 1989). On this record, the trustee has not met his burden.

The trustee can still prevail by showing that the IRS received the money without giving value, with knowledge of the voidability of the transfer to Lah, or other than in good faith. 11 U.S.C. § 550(b)(1). The trustee concedes that the transfer was for value—the IRS canceled Lah's tax indebtedness. Although the trustee argues that the IRS had knowledge and did not act in good faith, contrary to the majority, I do not believe this conclusion is warranted on the facts before us.[9]

Unlike the majority, I do not believe that it is the government that bears the burden of proof on this issue. The majority is correct when it asserts that Bankruptcy Rule 6001 places the burden of proving the good faith and knowledge of an *initial* transferee of real property under 11 U.S.C. § 549(e) on the party wishing to assert the validity of the transfer. This rule does not apply to section 550, however. Congress made an explicit choice to separate "the concepts of avoiding a transfer and recovering from the transferee." S. Rep. No. 989, 95th Cong., 2d Sess. 375-76 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5876, 6331. Here, it is not disputed that the initial transfer to Lah was wrongful

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[9] Since we are drawing inferences from stipulated facts, it might be preferable to have such inferences drawn by the Bankruptcy Court. However, the questions can perhaps be characterized as mixed questions of law and fact and to a large extent appear to turn on who has the burden of proof.

and could be avoided. The question to be answered is whether the money can be recovered from a *subsequent* transferee, the government.

Although the Code makes clear that initial transferees are generally presumed to be on notice of the voidability of a transfer and have few if any defenses to the trustee, (*see* 11 U.S.C. §§ 549, 550(a)(1); Bankruptcy Rule 6001), the Code also makes clear that subsequent transferees are not under such a severe disability. 11 U.S.C. § 550(b). Such a dichotomy is rationally related to the fact that initial transferees will generally have knowledge and therefore act in bad faith since they deal directly with the bankrupt. In contrast, subsequent transferees are much more likely to be innocent third parties. They have little ability to protect themselves by making cursory checks on their transferor. Absent an express rule placing the burden of proof on subsequent transferees, I believe the burden should rest on the party seeking to recover the property, at least as to the issues of the subsequent transferee's good faith and knowledge. Accordingly, I conclude that the trustee bears the burden of showing the IRS acted with knowledge or in bad faith. *See, e.g., Sarasota Plaza Assoc. Ltd. Partnership v. Trupin (In re Sarasota Plaza Assoc. Ltd. Partnership)*, 105 Bankr. 109, 110 (Bankr. M.D. Fla. 1989); *In re Closson*, 100 Bankr. at 347-48; *Holt v. FDIC (In re Instrument Sales & Serv., Inc.)*, 99 Bankr. 742, 746 (Bankr. W.D. Tex. 1987); *De Rochfort Co. v. Sunshine State Bank (In re De Rochfort Co.)*, 22 Bankr. 826, 827 (Bankr. S.D. Fla. 1982). I do not believe the trustee has met his burden.

There is no evidence in the record that the IRS had knowledge of the voidability of the transfer from the

corporation to Lah. The mere fact that the check contained a notation stating that the check was purchased by "Swiss Haus" is not sufficient to put any recipient of the check not familiar with the bankruptcy of Nordic Village, Inc. on *actual* notice that the transfer was voidable. Although likely true that certain individuals at the IRS were familiar with Nordic Village's bankruptcy, there is no showing on this record that the individuals who received the check had such knowledge. *See Smith v. Mixon (In re Mixon)*, 788 F.2d 229, 232 (4th Cir. 1986) (knowledge does not mean "constructive notice"). To impute the knowledge of each component of the IRS to every other component would place an untenable administrative burden on the agency.

Similarly, I do not believe the trustee has shown that the IRS acted in bad faith. Were Lah to have sent this check through the mail in the normal course of dealings with the IRS, there would be no doubt that the IRS had received the check in good faith. The trustee argues that because of the size of the check, the filing of IRS tax liens against Lah's assets, and the notation on the check, the IRS should have been suspicious when Lah presented it.

I do not believe that these circumstances, without more, would suggest to the IRS agent receiving the payment that the transfer was voidable. In collecting billions of tax dollars, the IRS routinely receives large checks, even from persons who are behind in their tax payments. Further, it is not uncommon for a cashier's check to have been purchased by someone other than the taxpayer, particularly where the tax debt arises out of the operation of a business. Moreover, the trustee's rule would require the IRS to investigate the sources of funds of hundreds, if not

thousands, of taxpayers. *Cf. FDIC v. Wood*, 758 F.2d 156, 162 (6th Cir.) (FDIC not charged with knowledge of a defense merely because information could be found in records of failed bank it took over since requirement would constitute unreasonable burden), *cert. denied*, 474 U.S. 944 (1985). Placing this burden on the IRS does not seem to have been the purpose of the good faith requirement. The primary concern was preventing a transferee from washing the transfer through an innocent third party who would then transfer the property to the transferee. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 2d Sess. 376 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 90 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5876, 6332. Accordingly, I do not believe the trustee has met his burden to prove that the IRS acted other than in good faith or with knowledge.

For all of these reasons, I respectfully dissent from the majority's decision to waive the sovereign immunity of the United States and also its finding that the IRS received the check under circumstances where it is charged with knowledge because it did not make inquiry.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 85-1483

IN RE: NORDIC VILLAGE, INC.
dba SWISS HAUS, DEBTOR

POST-JUDGMENT ORDER

[Filed May 18, 1989]

THOMAS D. LAMBROS, DISTRICT JUDGE

This matter is before the Court on the motion of appellant, United States of America, to alter or amend the judgment, entered February 26, 1986, which denied appellants' appeal from the final order of the Bankruptcy Court. For the reasons which follow, the motion of appellant is denied.

This case involved transfers not authorized by Title 11 or the Bankruptcy Court made subsequent to debtor's filing of a petition for relief under Chapter 11 of the Bankruptcy Code. The Bankruptcy Court concluded that debtor's post-petition transfers to appellants the Lake County Treasurer and the Internal Revenue Service were properly voidable by appellee Trustee under 11 U.S.C., Section 550(a)(1). This Court affirmed.

While the facts material to this motion are set out fully in the order affirming the Bankruptcy Court, a brief summary will be helpful here. At the time of its filing under Chapter 11, debtor owed monies to appellant IRS for taxes due. On July 18, 1984, upon receipt of a check written on the debtor's account by Josef Lah, officer of the debtor, the AmeriTrust Company issued to Mr. Lah an official bank check payable to the Internal Revenue Service in the amount of $20,000. Mr. Lah delivered the bank check to the Internal Revenue Service. The Service complied with Mr. Lah's instruction to apply the monies against the outstanding tax liability of Josef Lah, d.b.a. Josef's Hair Design (*not* of debtor Nordic Village, d.b.a. The Swiss Haus). The check bears a notation "Remitter-Swiss Haus, Inc." The notation, however, is crossed off and there is no indication in the record as to when or how the notation was altered. There is no indication on the check that the remitter is Josef's Hair Design.

The issue presented by this motion is whether the Court properly determined that the trustee could recover the $20,000 from the Internal Revenue Service under 11 U.S.C., Section 550. Section 549 of the Code allows a trustee to avoid post-petition transfers not authorized by Title 11 or the Bankruptcy Court. Section 550 outlines from whom the trustee may recover. Section 550(a) provides that ". . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

> (2) any immediate or mediate transferee of such initial transferee."

Section 550(b) protects unknowing transferees by providing that "[t]he trustee may *not* recover under section (a)(2) of this section from—

> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided . . ." (emphasis supplied).

The crux of this case is whether the Internal Revenue Service should be responsible for the funds under Section 550(a) or protected under section 550(b). The record in this case indicates that the debtor controlled and directed the transfer of the post-petition payments. The debtor, or at least its agent, procured the official bank check and delivered it to the Internal Revenue Service. The Bankruptcy Court correctly considered the IRS to be an initial transferee of debtor. The scope of 550(b) does not include an initial transferee of the debtor or of an agent of the debtor even if the initial transferee takes in good faith. *See Bonded Financial Services v. European American Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (disregarding agent of debtor) and 4 Collier on Bankrutpcy, paragraph 550.03 (15th ed. 1989), *but c.f., In re Auto-Pak, Inc.*, 73 B.R. 52 (D.D.C.) (IRS was "immediate or mediate" transferee of initial transferee, when cashier's check contained notation that check was for obligation of a second corporation also owned by debtor's president).

In contrast to the facts detailed in *In re Auto-Pak, Inc.*, the record indicates that the IRS in the instant case was scheduled as a creditor and had notice of

the pendency of the bankruptcy proceedings, in which it filed proofs of claim. Most significantly, the receipt of an official check from AmeriTrust Co., referenced its source as Swiss Haus, Inc., (unlike *In re Auto-Pak, Inc.*, the debtor was referenced on the check) and this was evidence sufficient to place upon the IRS the duty of making inquiry. The fact that Josef directed application of his $20,000 check to liabilities of an entity other than the debtor should not, by itself, allow the IRS to now claim good faith receipt. Therefore, even if Josef Lah is considered the initial transferee and the IRS a subsequent transferee, the IRS cannot rely on section 550(b) in this case. The Bankruptcy Court correctly held the Internal Revenue Service liable to the trustee for this transfer. Appellant's motion to alter or amend judgment is denied.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

Dated: 5/18/89

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 85-1483

IN RE: NORDIC VILLAGE, INC.
dba SWISS HAUS, DEBTOR

ORDER

[Filed Feb. 26, 1986]

LAMBROS, DISTRICT JUDGE

This action arises on appeal from the final order of the Bankruptcy Court, pursuant to Rule 8001 of the Bankruptcy Rules. By order dated April 3, 1985, Bankruptcy Judge Alice Batchelder concluded that defendant/appellants, the Treasurer of Lake County and the Internal Revenue Service, were recipients of postpetition transfers. According to the order, these transfers were not authorized by Title 11 or the Bankruptcy Court, and thus such funds are recoverable by the bankruptcy trustee from defendant/appellants. For the foregoing reasons, the undersigned Judge affirms the decision of the Bankruptcy Court.

The material facts of this case have been stipulated by the parties. On March 27, 1984, Nordic Village, Inc., d.b.a. Swiss House, filed a petition for relief under Chapter 11 of the Bankruptcy Code. At that

time, the debtor owed monies to the Lake County Treasurer for personal property taxes, and to the Internal Revenue Service for withholding and F.I.C.A. taxes. On July 8, 1984, Marie Lah, officer of the debtor, wrote a check for $10,070.32 on the debtor's account, in payment of delinquent real estate taxes to the Lake County Treasurer. The Treasurer deposited this check with the Ameritrust Company, and the check was returned to the Treasurer due to insufficient funds in the debtor's account. After Ameritrust received sufficient funds to cover the draft, the bank issued an official bank check to the Treasurer, which clearly indicated that the source of funds was the debtor's checking account. The Treasurer applied the monies toward delinquent real estate taxes owing on property owned by Josef and Marie Lah. On July 18, 1984, upon receipt of a check written on the debtor's account by Josef Lah, officer of the debtor, Ameritrust issued to Mr. Lah an official bank check, payable to the Internal Revenue Service in the amount of $20,000.00. Mr. Lah delivered the bank check to the Internal Revenue Service who complied with Mr. Lah's instruction to apply the monies against the outstanding tax liability of Josef Lah, d.b.a. Josef's Hair Design.

There is no dispute that these transfers took place subsequent to the filing of the Chapter 11 petition and that the transfers were neither authorized by the Bankruptcy Code nor the Bankruptcy Court. The issue in dispute is whether the Bankruptcy Court properly concluded that these two defendants are recipients against whom these monies are recoverable. Both defendants argue that the debtor paid Ameritrust, and that Ameritrust, as the initial transferee, paid them. However, the Bankruptcy Court correctly

concluded that Ameritrust bank was not the initial transferee of the monies, but merely a conduit of the funds. Unlike the defendants, the bank did not receive any benefit from the transfer.

The applicable provision of the Bankruptcy Code, 11 U.S.C. § 550(a)(1) states:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b) or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made;
>
> or
>
> (2) any immediate or mediate transferee of such initial transferee.

Entities such as a bank which merely facilitate another's receipt or conversion of the debtor's property, but do not receive or convert the property themselves, are not liable to the trustee. *Selby v. Ford Motor Co.*, 405 F. Supp. 164 (E.D. Mich. 1975), *aff'd.* 590 F.2d 642 (6th Cir. 1979). When the debtor transfers its funds, through a bank, and the bank receives no benefit from the postpetition transfers, the bank is not the initial transferee of the monies. *Campbell v. Small Business Administration (In re: Jameson's Foods, Inc.)*, 35 B.R. 433 (Bkrtcy. D.S.C. 1983). Accordingly, under Ohio law, an official bank check is an instrument issued by an authorized bank officer. The bank is not liable to the purchaser of the instrument once it is issued. *Cross v. Exchange Bank*

Co., 110 Ohio App. 219 (1958). The bank is solely liable on the instrument to the named payee. *Id.*

In the instant action, Ameritrust received no benefit from the postpetition transfers, but acted merely as the debtor's agent. In the case of the Internal Revenue Service, a principal of the debtor procured and delivered the official bank check. Similarly, a principal of the debtor transferred the monies to the recipient Lake County treasurer. At the direction of the principals of the debtor, the two defendants applied the monies received toward the non-debtor delinquent accounts. Thereby, defendants, not Ameritrust, received benefits from the unauthorized post petition transfers.

For these reasons, the undersigned Judge finds that there were unauthorized postpetition transfers of $10,070.32 to the Lake County Treasurer and $20,000.00 to the Internal Revenue Service, and that the trustee in bankruptcy may recover such amounts from defendants. Therefore, the appeal is denied and the judgment of the Bankruptcy Judge is affirmed. This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

Dated: 2/25/86

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 85-1483

IN RE: NORDIC VILLAGE, INC.
dba SWISS HAUS, DEBTOR

JUDGMENT

[Filed Feb. 26, 1986]

LAMBROS, DISTRICT JUDGE

In accordance with the memorandum opinion and order of this date, the appellants' appeal from the Bankruptcy Court is denied and the judgment of the Bankruptcy Court as reflected in its memorandum of decision is hereby affirmed.

This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

Dated: 2/25/86

APPENDIX E

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. B84-771

IN RE: NORDIC VILLAGE, INC.
dba SWISS HAUS, DEBTOR

Adv. No. B84-694

DAVID O. SIMON, TRUSTEE, PLAINTIFF

v.

JOHN HOWARD, ET AL., DEFENDANTS

MEMORANDUM OF DECISION AND ORDER

[Filed Apr. 3, 1985]

This matter came before the Court on the complaint of the trustee to avoid postpetition transfers of property of the within estate. Two of the defendants, the Treasurer of Lake County and the Internal Revenue Service, have agreed with the trustee to submit the proceeding to the Court, in so far as it relates to them, on their stipulations and briefs.

On consideration of the parties' stipulations and briefs the Court finds that the complaint against the defendants Treasurer of Lake County and Internal Revenue Service is well taken, that the two defendants were the recipients of postpetition transfers, not

authorized by Title 11 or this Court, that such funds are recoverable from the defendants by the trustee, and makes the following findings of fact and conclusions of law in support of its ruling.

Nordic Village, Inc., d.b.a. Swiss Haus, filed a petition for relief under Chapter 11 of the Bankruptcy Code on March 27, 1984. At the time of the filing of the petition the debtor owed monies to the Lake County Treasurer for personal property taxes and to the Internal Revenue Service for withholding and F.I.C.A. taxes. Both taxing authorities had liens filed against the debtor.

On July 8, 1984, Marie Lah, an officer of the debtor, wrote a check to the Lake County Treasurer in the amount of Ten Thousand Seventy Dollars and Thirty-Two cents ($10,070.32), in payment of delinquent real estate taxes. The check was subsequently deposited with the Ameritrust Company by the Treasurer, and returned to the Treasurer due to insufficient funds in the debtor's account. Shortly thereafter Ameritrust issued an official bank check to the Lake County Treasurer. The bank check, which clearly indicated that the source of funds was debtor's checking account, was issued only after Ameritrust had received sufficient funds to cover the draft. All of the monies received by the Treasurer were applied towards delinquent real estate taxes owing on property owned by Josef and Marie Lah.

On July 18, 1984, Josef Lah, an officer of the debtor, wrote a check on the debtor's account payable to the Ameritrust Company in the amount of Twenty-Six Thousand Dollars ($26,000.00) and received from Ameritrust an official bank check payable to the Internal Revenue Service for the amount of Twenty Thousand Dollars ($20,000.00). (The remaining Six

Thousand Dollars ($6,000.00) is not at issue here.) Josef Lah delivered the official bank check to the Internal Revenue Service who cashed it and, at Josef Lah's direction, applied it against the outstanding tax liability of Josef Lah, d.b.a. Josef's Hair Design.

The trustee filed a complaint against the Lake County Treasurer and the Internal Revenue Service for recovery of the unauthorized postpetition transfers. The defendants have stipulated that the transfers as described above took place subsequent to the filing of the bankruptcy petition. The only issue in dispute is whether the trustee can recover the monies from the two taxing authorities. Both of the defendants take the position that the debtor paid Ameritrust and Ameritrust paid them. Hence, they allege that they did not receive a transfer from the debtor, and that the trustee should properly be looking to the bank for liability on the postpetition transfers.

The Court will first dispose of the question of the recoverability of the two transfers. Section 549 of the Code allows a trustee to avoid postpetition transfers not authorized by Title 11 or the bankruptcy court. There is no dispute that the transfers which are the subject of this proceeding took place subsequent to the filing of the Chapter 11 petition and were not authorized by the Code or this Court. Accordingly, the Court finds that the transfers postpetition by the debtor of Ten Thousand Seventy Dollars and Thirty-Two Cents ($10,070.32) and Twenty Thousand Dollars ($20,000.00) are recoverable by the trustee. It must now be determined from whom these monies are recoverable.

Under Ohio law a bank money order or cashier's check is an instrument issued by an authorized officer of a bank and paid from the bank's funds. *State*

v. Perkins, 165 Ohio St. 185 (1956). A bank is solely liable on an instrument it issues to the payee named. There is no right of countermand by a purchaser of a bank money order or cashier's check and the bank is not liable to the purchaser of such an instrument once it is issued. *Cross v. Exchange Bank Co.*, 110 Ohio App. 219 (1958). A bank is thus a "middle man" between the true payor and his payee. The bank may issue an official check, but it is the purchaser who supplies the funds, specifies the payee, and directs delivery of the instrument.

The Bankruptcy Code recognizes this "middle man" status of banks. Under § 550 of the Code, and its predecessor under the Act, an initial transferee of funds recoverable by a trustee is liable to the trustee for such funds. Entities which merely facilitate another's receipt or conversion of the debtor's property, however, but do not receive or convert the property themselves, are not liable to the trustee. *Selby v. Ford Motor Co.*, 405 F.Supp. 164 (E.D. Mich. 1975), *affd.* 590 F.2d 642 (6th Cir. 1979). Thus, when it is the debtor who is transferring its funds and the bank is acting only as a conduit of the funds without receiving any benefit the bank is not the initial transferee of the monies. *Campbell v. Small Business Administration (In re Jameson's Foods, Inc.)*, 35 Bankr. 433 (Bankr. D.S.C. 1983). *See also, Kogan v. National Bank of North America*, 402 F. Supp. 359 (E.D.N.Y. 1975).

In the matter at bar the debtor controlled and directed the transfer of the postpetition payments. Before the check from Ameritrust was issued to the Lake County Treasurer, Ameritrust had received sufficient funds in debtor's checking account to cover the draft. In the instance of the Internal Revenue

Service, it was the debtor who procured the official bank check and delivered it to the Internal Revenue Service. Ameritrust received no benefit from the post-petition transfers, but acted merely as a conduit of the funds, an agent of the debtor. It was the debtor who transferred the monies to the recipients and initial transferees, the Lake County Treasurer and the Internal Revenue Service. Further, the two taxing authorities applied the monies they received towards non-debtor delinquent accounts, pursuant to the direction of principals of the debtor.

Accordingly, this Court finds that there were post-petition transfers of Ten Thousand Seventy Dollars and Thirty-Two Cents ($10,070.32) and Twenty Thousand Dollars ($20,000.00) made by the debtor to the Lake County Treasurer and Internal Revenue Service respectively, and that the trustee may recover such amounts from those entities.

It is so ORDERED.

Dated this 3rd day of April, 1985.

/s/ Alice M. Batchelder
ALICE M. BATCHELDER
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. B84-771

IN RE: NORDIC VILLAGE, INC.
dba SWISS HAUS, DEBTOR

Adv. No. B84-694

DAVID O. SIMON, TRUSTEE, PLAINTIFF

v.

JOHN HOWARD, ET AL., DEFENDANTS

JUDGMENT ORDER

[Filed Apr. 3, 1985]

This matter having come before the Court on the complaint by the trustee to avoid postpetition transfers made to the Lake County Treasurer and the Internal Revenue Service, and a decision having been rendered, it is hereby ORDERED, ADJUDGED and DECREED that the postpetition transfers by the debtor of Ten Thousand Seventy Dollars and Thirty-two Cents ($10,070.32) and Twenty Thousand Dollars ($20,000.00) were made to the Lake County

Treasurer and Internal Revenue Service respectively without authority, that the monies were applied towards the payment of non-debtor delinquent accounts, that such amounts are recoverable by the trustee, and that the Lake County Treasurer and the Internal Revenue Service are the parties liable to the trustee for the recoverable amounts, and that judgment is hereby entered in favor of the Trustee and against the defendant, the Internal Revenue Service, in the sum of Twenty Thousand Dollars ($20,000.00); and in favor of the Trustee and against the defendant Lake County Treasurer, in the sum of Ten Thousand Seventy Dollars and Thirty-two Cents ($10,070.32).

Dated this 3rd day of April, 1985.

/s/ Alice M. Batchelder
ALICE M. BATCHELDER
United States Bankruptcy Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-3656

IN RE: NORDIC VILLAGE, INC.,
d/b/a SWISS HAUS, DEBTOR

INTERNAL REVENUE SERVICE, PLAINTIFF-APPELLANT
ROBERT E. MARTIN, LAKE CO. TREASURER, PLAINTIFF

v.

NORDIC VILLAGE, INC.; DAVID O. SIMON, TRUSTEE,
DEFENDANTS-APPELLEES

ORDER

[Filed Jan. 23, 1991]

BEFORE: KENNEDY, Circuit Judge; WELLFORD *, Senior Circuit Judge; and JOINER**, Senior United States District Judge.

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* Hon. Harry W. Wellford assumed senior status on January 21, 1991.

** Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3656

IN RE: NORDIC VILLAGE, INC., DEBTOR

INTERNAL REVENUE SERVICE, PLAINTIFF-APPELLANT

v.

NORDIC VILLAGE, INC.; DAVID O. SIMON, TRUSTEE,
DEFENDANTS-APPELLEES

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and JOINER, Senior District Judge.

JUDGMENT

[Filed Oct. 4, 1990]

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER
OF THE COURT

LEONARD GREEN
Clerk

/s/ Leonard Green

Issued as Mandate January 31, 1991

COSTS: None

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APPENDIX I

STATUTORY PROVISIONS INVOLVED

§ 106. Waiver of sovereign immunity

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

§ 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of—

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section

544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

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(2)

No. 90-1629

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,

v.

NORDIC VILLAGE, INC., DAVID O. SIMON,
Trustee

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent's Brief In Opposition

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40p.

QUESTION PRESENTED

Whether a bankruptcy court can order an agency of the federal government to return to the Trustee property of the bankruptcy estate which was transferred post-petition and without authorization by the bankruptcy court or by any provision of the Bankruptcy Code.

PARTIES TO THE PROCEEDINGS

David O. Simon was the Trustee in Bankruptcy of the Debtor, Nordic Village, Inc., during the pendency of the Debtor's Chapter 11 proceeding. On October 29, 1987, the Bankruptcy Court converted Nordic Village, Inc's bankruptcy case from a proceeding under Chapter 11 of the Bankruptcy Code to a proceeding under Chapter 7 of the Bankruptcy Code. At that time, Richard A. Baumgart was appointed as Trustee to succeed David O. Simon.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE A BANKRUPTCY COURT TO ORDER THE UNITED STATES TO RETURN AN UNAUTHORIZED, POST-PETITION TRANSFER OF PROPERTY OF THE ESTATE TO THE TRUSTEE 3

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT §§550 AND 106 OF THE BANKRUPTCY CODE AUTHORIZE SUITS BY A TRUSTEE IN BANKRUPTCY TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS OF PROPERTY OF THE BANKRUPTCY ESTATE FROM THE UNITED STATES NOTWITHSTANDING ANY ASSERTION OF SOVEREIGN IMMUNITY BY THE UNITED STATES 13

A. There Is No Real Conflict Between The Circuits As To Whether §106(c) Waives The Sovereign Immunity Of The United States To Actions To Recover Property Of The Estate 14

Page

B. Since Only A Handful Of The Provisions Made Applicable To The United States By Operation Of §106(c) Envision Monetary Recovery, The United States Does Not Confront Claims For Monetary Recovery Pursuant To A Wide Range Of Bankruptcy Code Provisions Under The Sixth Circuit's Interpretation Of The Statute 16

C. The Sixth Circuit's Conclusion That §§550 And 106 Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The Federal Government Is Fully Supported By The Language Of §106(c), The Language Of The Bankruptcy Code Provisions Containing The Trigger Words Specified In §106(c)(1), And The Legislative History 19

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Page

Arkansas Writers' Project Inc. v. Ragland, 481 U.S. 221 (1987) 21

Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987) 6

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 21, 23

Begier v. Internal Revenue Service, 110 S. Ct. 2258 (1990) 9, 18

Block v. Neal, 103 S. Ct. 1089 (1983) 28

Blum v. Stenson, 465 U.S. 886 (1984) 26

Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 23

In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded* 111 S. Ct. 425 (1990, *reinstated* 924 F.2d 36 (2d Cir. 1991), *cert. denied.* — S. Ct. —, 59 U.S.L.W. 3583 (1991) 6, 7

In re Dolard, 519 F.2d 282 (9th Cir. 1975) 26

Everett v. Judson, 228 U.S. 474 (1913) 8

Flora v. United States, 357 U.S. 63 (1958), *aff'd after reh'g*, 362 U.S. 145, *reh'g denied*, 362 U.S. 972 (1960) 26

Franchise Tax Board of California v. United States Postal Service, 104 S. Ct. 2549 (1984) 26

Gingold v. United States, 80 B.R. 555 (Bankr. N.D. Ga. 1987) 24

Goggin v. Division of Labor Law Enforcement, 336 U.S. 118 (1949) 8

Gower v. Farmers Home Administration, 20 B.R. 519 (Bankr. N.D. Ga. 1982) 24

In re Gwilliam, 519 F.2d, 507 (9th Cir. 1975) 26

Page

Hoffman v. Connecticut Department of Income Maintenance, 109 S. Ct. 2818 (1989) 14, 15, 16, 17, 18, 20, 21, 22, 25, 28

In re Iverson, 108 B.R. 272 (Bankr. D. Or. 1989) .. 22

Keifer and Keifer v. Reconstruction Finance Corp., 59 S. Ct. 516 (1939) 22, 26, 28

Kelly v. Robinson, 479 U.S. 36 (1986) 23

In Re Lawson Burich Association, Inc., 59 B.R. 681 (1986) 22

Neavear v. Schweiker, 675 F.2d 1201 (7th Cir. 1982) 24

Neil v. Biggers, 409 U.S. 188 (1972) 21

In re 995 Fifth Ave. Associates, L.P., 116 B.R. 384 (Bankr. S.D. N.Y. 1990) 23

In re Pearson, 917 F.2d 1215 (9th Cir. 1990), petition for cert. pending No. 90-1208 .... 15, 16, 21

Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984) 23

In re Price, 103 B.R. 989 (Bankr. N.D. Ill. 1989), *aff'd In re Price* — B.R. — (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796) 22

R & L Refunds v. United States, 45 B.R. 733 (Bankr. W.D. Ky. 1985) 24

Remke, Inc. v. United States, 5 B.R. 299 (Bankr. E.D. Mich. 1980) 24

SBA v. Rinehart, 887 F.2d 165 (1989) 14, 15, 20

In re Simmons, 110 B.R. 72 (Bankr. M.D. Fla. 1990) 22

TWA, Inc. v. Hardison, 432 U.S. 63 (1977) 21

United States v. Whiting Pools, Inc., 103 S. Ct. 2309 (1983) 1, 4, 5, 6, 8, 12, 13, 18, 22

Page

Constitution, statutes and rules:

Bankruptcy Code

11 U.S.C. §101(14) 2, 6, 12
11 U.S.C. §106 ..... 2, 13, 19, 23, 24
11 U.S.C. §106(a) 26
11 U.S.C. §106(b) 26
11 U.S.C. §106(c) ..... passim
11 U.S.C. §106(c)(1) 15, 16, 17, 19, 24
11 U.S.C. §303(b)(1) 17
11 U.S.C. §303(c) 17
11 U.S.C. §303(f) 9
11 U.S.C. §303(j) 17
11 U.S.C. §341(a) 17
11 U.S.C. §343 17
11 U.S.C. §349(b)(3) 17
11 U.S.C. §361 17
11 U.S.C. §362(a) 14
11 U.S.C. §362(h) 15, 16
11 U.S.C. §363 5
11 U.S.C. §363(c)(2)(A) 17
11 U.S.C. §365 17
11 U.S.C. §501 17
11 U.S.C. §502 17
11 U.S.C. §505 17
11 U.S.C. §506(a) 17
11 U.S.C. §507 17
11 U.S.C. §525 17
11 U.S.C. §541 18
11 U.S.C. §541(a) 5, 8
11 U.S.C. §541(a)(1) 5, 8
11 U.S.C. §541(a)(6) 8
11 U.S.C. §541(a)(7) 8
11 U.S.C. §542 18
11 U.S.C. §542(a) 4, 5, 6, 19, 25
11 U.S.C. §542(c) 9

	Page
11 U.S.C. §543	8
11 U.S.C. §544	5, 10, 25
11 U.S.C. §545	5, 8, 10, 25
11 U.S.C. §547	9, 10, 18, 25
11 U.S.C. §547(b)(2)	27
11 U.S.C. §548	9, 10, 25
11 U.S.C. §549	1, 2, 3, 5, 9, 10, 11, 12, 18, 25
11 U.S.C. §549(a)	1, 9, 11, 12
11 U.S.C. §549(b)	10
11 U.S.C. §549(c)	10
11 U.S.C. §549(d)	10
11 U.S.C. §550	1, 2, 3, 10, 13, 19, 25
11 U.S.C. §550(a)	2, 10, 11, 12, 25
11 U.S.C. §551	10
11 U.S.C. §553	17
11 U.S.C. §553(b)	10, 25
11 U.S.C. §702(a)	17
11 U.S.C. §705	17
11 U.S.C. §724(a)	10, 25
11 U.S.C. §726	1, 9, 11, 17
11 U.S.C. §727(c)	17
11 U.S.C. §1102	17
11 U.S.C. §1107	4, 11
11 U.S.C. §1107(a)	4
11 U.S.C. §1108	4, 11
11 U.S.C. §1109(b)	17
11 U.S.C. §1121(c)	17
11 U.S.C. §1141	17
11 U.S.C. §1142	18
11 U.S.C. §1143	18
28 U.S.C. §1334(d)	11

	Page
Miscellaneous:	
King, 4 Collier on Bankruptcy, ¶541.04, at 541-22 (15th Ed. 1989)	8
King, 4 Collier on Bankruptcy, ¶549-02 (15th Ed. 1989)	10
124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards)	27
124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini)	27
124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards)	27
124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini)	27
H.R. Rep. 95-595 at 373	18
U.S. Code Cong. ¶ Admin. News, 1978, p. 6329	18

SUMMARY OF THE ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE A BANKRUPTCY COURT TO ORDER THE UNITED STATES TO RETURN AN UNAUTHORIZED, POST-PETITION TRANSFER OF PROPERTY OF THE ESTATE TO THE TRUSTEE.

This Court in *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309 (1983) has previously determined that the Bankruptcy Code authorizes a bankruptcy court to subject the United States to a turnover order with respect to property of the estate seized prior to the commencement of the bankruptcy case. The analysis of the Bankruptcy Code adopted by this Court in *Whiting Pools* mandates the same result in this case involving an unauthorized post-petition transfer of property of the bankruptcy estate.

Congress has expressly provided that the bankruptcy court has exclusive jurisdiction over property of the estate. Section 726 of the Bankruptcy Code guarantees equality of distribution among creditors, a fundamental policy of bankruptcy law, and provides that distribution of property of the estate will be handled by the Bankruptcy Court. Section 549 furthers the fundamental policy of equality of distribution among creditors. Section 549(a) of the Bankruptcy Code authorizes a trustee in bankruptcy to avoid all post-petition transfers of property of the bankruptcy estate which are not authorized by the bankruptcy court or by provisions of the Bankruptcy Code. Section 550 of the Bankruptcy Code authorizes recovery of the avoided transfer. These provisions, read together, advance the policy of equality of distribution to creditors, by providing a mechanism whereby property of the bankruptcy estate wrongfully

transferred after the commencement of the case can be brought back into the bankruptcy estate.

Sections 549 and 550 of the Bankruptcy Code are applicable to all creditors. Section 550(a) authorizes recovery from an "entity." The Bankruptcy Code, in §101(14), expressly states that the term "entity" includes a governmental unit. These provisions indicate that the same result should obtain when the United States is the creditor.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT §§550 AND 106 OF THE BANKRUPTCY CODE AUTHORIZE SUITS BY A TRUSTEE IN BANKRUPTCY TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS OF PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE FROM THE UNITED STATES NOTWITHSTANDING ANY ASSERTION OF SOVEREIGN IMMUNITY BY THE UNITED STATES.

Section 106(c) is a straight-forward and specific waiver of sovereign immunity as relates to the federal government. Section 106(c) expressly provides that any provision of the Bankruptcy Code which contains "creditor," "entity," or "governmental unit" applies to the United States. The scope of this waiver of sovereign immunity can only be determined by reference to the Bankruptcy Code provisions containing these trigger words. Section 550 contains one of the trigger words and therefore is applicable to the United States. Further, §550(a) specifically grants the bankruptcy court the authority to order the recipient of an avoided transfer to pay the value of the property transferred to the Trustee. Therefore, §§550 and 106 authorize suits by a Trustee in bankruptcy to recover a transfer of the type involved

here, an unauthorized post-petition transfer of property of the bankruptcy estate, from the United States notwithstanding any assertion of sovereign immunity.

The legislative history of §106(c) and of the related provisions containing the trigger words provides further evidence of Congressional intent to waive the sovereign immunity of the United States to permit a Trustee in bankruptcy to avoid and recover transfers of property of the bankruptcy estate.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE A BANKRUPTCY COURT TO ORDER THE UNITED STATES TO RETURN AN UNAUTHORIZED, POST-PETITION TRANSFER OF PROPERTY OF THE ESTATE TO THE TRUSTEE.

The case before this Court presents a narrow issue of law: whether a Bankruptcy Court can order an agency of the federal government to return to the trustee property of the bankruptcy estate which was transferred post-petition and without authorization by the Bankruptcy Court or by any provision of the Bankruptcy Code. More specifically, this case requires this Court to determine whether the Bankruptcy Court can, under §§549 and 550 of the Bankruptcy Code, compel the Internal Revenue Service, an agency of the United States, to return to the bankruptcy estate property of the bankruptcy estate which the Internal Revenue Service ("IRS") improperly received subsequent to the commencement of the bankruptcy case from a defalcating officer of the debtor in satisfaction of the officer's personal tax obligations.

The issue of whether the Bankruptcy Court has the power to order an agency of the United States to return property of the estate has been before this Court previously. In *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309 (1983), this Court held that §542(a) of the Bankruptcy Code authorized the Bankruptcy Court to subject the IRS to a turnover order with respect to property of the estate seized prior to the commencement of the bankruptcy case.

In *Whiting Pools*, the IRS, an agency of the United States, had seized, prior to the filing of the Debtor's petition for relief under Chapter 11 of the Bankruptcy Code, the Debtor's tangible personal property pursuant to a tax levy. Subsequent to the filing of the petition in bankruptcy, the Debtor, acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, sought an order requiring the IRS to turn over the seized property to the bankruptcy estate pursuant to §542(a) of the Bankruptcy Code. *Whiting Pools*, 103 S. Ct. at 2311.[1]

Much of this Court's analysis in *Whiting Pools* indicates that it was troubled by the notion that the IRS, which had taken possession of property of the debtor prior to the commencement of the debtor's bankruptcy case pursuant to a valid tax levy, could be compelled to return the property as a consequence of the filing of the debtor's bankruptcy petition. Noting that the IRS had, by virtue of its tax lien, a secured interest in the debtor's property, the Court began its analysis by examining whether §542(a) of the Bankruptcy Code "generally"

[1]Pursuant to §1107(a) of the Bankruptcy Code the "debtor in possession shall have all of the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, . . . of a trustee serving in a case under this chapter." 11 U.S.C. §1107(a).

authorizes the turnover of a debtor's property seized by a secured creditor prior to the commencement of reorganization proceedings. *Whiting Pools*, 103 S. Ct. at 2312. Focusing on the broad range of property to be included in the estate, the Court stated that:

> §541(a) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." . . . Most important, in the context of this case, §541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under §363 to turn that property over to the trustee. . . .
>
> As does all bankruptcy law, §542(a) modifies the procedural rights available to creditors to protect and satisfy their liens. In effect, §542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings. (Citations omitted).

Whiting Pools, 103 S. Ct. at 2313-14. This Court specifically noted that its analysis of §542(a) was consistent with other provisions of the Bankruptcy Code which address the scope of the estate: specifically, §544, giving the Trustee the right of a lien creditor; §545, granting the Trustee the power to avoid statutory liens; and §549, granting the Trustee the power to avoid certain post-

petition transactions. *Whiting Pools*, 103 S. Ct. at 2314-15, n. 15.

Having concluded that the reorganization estate includes property of the Debtor seized pre-petition, this Court then considered whether §542(a) authorized the Bankruptcy Court to subject the IRS, an agency of the federal government, to a turnover order with respect to the seized property. The Court's analysis was direct and to the point:

> We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by §542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity" used in §542(a), includes a governmental unit. §101(14). . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

103 S. Ct at 2315-16.

Application of this Court's analysis in *Whiting Pools* to this case is compelled by the fact that this dispute is over an unauthorized post-petition transfer of property of the estate. The operative facts and timing of a dispute may render it uniquely a bankruptcy case. *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1400 (2d Cir. 1990), vacated and remanded, 111 S. Ct. 425 (1990, reinstated 924 F.2d 36 (2d Cir. 1991), cert. denied, -- S. Ct. ---, 59 U.S.L.W. 3583 (1991). See also *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987). Such claims, arising post-petition and involving property of the estate, are intrinsic to the administration of bankruptcy cases. *Ben Cooper*, 896 F.2d at 1399-1400.

In *Ben Cooper*, the Second Circuit considered the question of whether an adversary proceeding, which arose after the debtor filed its chapter 11 petition and which was founded on state contract law, was within the scope of the federal bankruptcy power. *Ben Cooper*, 896 F.2d at 1399. At issue was an adversary proceeding filed in the Bankruptcy Court by the Debtor seeking a declaration that the insurance policy procured post-petition should remain in effect, determining that the insurance company was liable for losses sustained by the Debtor in Possession in a fire at one of its manufacturing facilities, and for punitive damages. *Ben Cooper*, 896 F.2d at 1397.

Noting that the date of the filing of the petition for relief operates as a line of cleavage against which the property of the estate is determined and rights of others connected with the proceeding are adjusted, the Second Circuit asserted that "[l]ogically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition." *Ben Cooper*, 896 F.2d at 1399. The Second Circuit specifically determined that the manufacturing facility where the fire occurred was an asset of the estate, that the Debtor's reorganization plan promised adequate insurance for estate assets, that the insurance company was aware that it was dealing with a debtor in possession, and that the subject matter of the policy was an asset of the estate, and the Court of Appeals held that the Bankruptcy Court could properly exercise jurisdiction over the matter. *Ben Cooper*, 896 F.2d at 1399. It concluded that "It is more difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." *Ben Cooper*, 896 F.2d at 1400.

Unlike the state law contract claim at issue in *Ben Cooper*, this case arises directly from substantive bank-

ruptcy law. Section 541(a)(1) provides that the commencement of a case creates a bankruptcy estate consisting of all the debtor's legal and equitable interests in property as of the commencement of the case. 11 U.S.C. §541(a)(1). Other subsections of §541(a) provide that property of the estate also includes proceeds, product, offspring, rents or profits of or from property of the estate, and any interest in property that the estate acquires after the commencement of the case. 11 U.S.C. §541(a)(6) and (a)(7).

This Court, in construing the direct predecessor of §541(a) has stated that:

> the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned as the time of the filing of the petition.

Goggin v. Division of Labor Law Enforcement, 336 U.S. 118, 125-26 (1949) (quoting *Everett v. Judson*, 228 U.S. 474, 479 (1913). The line drawn at the filing date also adjusts "the rights of others connected with the proceeding." KING, 4 COLLIER ON BANKRUPTCY ¶541.04, at 541-22 (15th Ed. 1989). Among other rights, their entitlement to property of the estate is determined by reference to that date.

As noted by this Court in *Whiting Pools*, Congress intended that a broad range of property be included in the bankruptcy estate. *Whiting Pools*, 103 S. Ct. at 2313. The scope of the estate can be measured by the various provisions enacted by Congress which bring property into the estate: §543, dealing with property in the hands of a custodian; §545, granting the Trustee the authority

to avoid statutory liens; §547, granting the Trustee authority to avoid preferential transfers; §548, granting the trustee authority to avoid fraudulent conveyances; and §549, granting the trustee the authority to avoid post-petition transfers. Only one provision was enacted, however, to deal with distribution of the collected estate assets. Congress specifically provided that distribution of property of the estate shall be governed by the provisions of §726 of the Bankruptcy Code. Section 726 guarantees equality of distribution of estate assets among creditors of the Debtor, thus advancing a central policy of the Bankruptcy Code. *Begier v. United States*, 110 S. Ct. 2258, 2262 (1990).

Section 549(a) of the Bankruptcy Code is a provision that furthers this fundamental policy of equality of distribution among creditors. Section 549(a) provides, in pertinent part, that:

> [T]he trustee may avoid a transfer of property of the estate -
>
> (1) made after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. §549. The language of §549 is precise and explicit. It grants a trustee in bankruptcy the authority to avoid *all* post-petition transfers of property of the estate that are either unauthorized by the Bankruptcy Court or by the Bankruptcy Code, including those that are authorized by §§303(f) or §542(c) of the Bank-

ruptcy Code.[2] Pursuant to §551 of the Bankruptcy Code, any transfer avoided under §549 is preserved for the benefit of the estate. 11 U.S.C. §551.

While §549 merely provides for a declaration that an unauthorized post-petition transfer of property of the estate may be avoided, §550 authorizes recovery of the avoided transfer. Section 550(a) of the Bankruptcy Code provides that:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, the value of such property, from-
>
> (1) the initial transferee of such transfer or the entity for whose benefit the transfer was made; or
>
> (2) any immediate or mediate good faith transferee of such initial transferee.

11 U.S.C. §550(a).

[2]The trustee's avoiding powers under §549 are limited in three ways. Subsections (b) and (c) create two very narrow exceptions to the trustee's power of avoidance. First, §549(b) provides that transfers during the "involuntary gap" period between the filing of the petition and the order for relief in an involuntary case are not voidable to the extent that post-petition value is given. Section 549(c) provides that a trustee may not avoid transfers of realty to good faith purchasers for present fair equivalent value and without knowledge of the commencement of the case, if a copy or notice of the petition has not been filed in an appropriate recording office where the property is located. Section 549(d) contains a separate statute of limitations for the trustee's avoiding powers under §549. None of these limitations are applicable to this case. KING, 4 COLLIER ON BANKRUPTCY ¶549-02 (15th Ed. 1989).

In short, §549(a) and §550(a), read together, advance the policy of equality of distribution to creditors that lies at the heart of bankruptcy law by providing a mechanism whereby property of the estate wrongfully transferred after the commencement of the case can be brought back into the bankruptcy estate.

Congress has expressly provided that the district court in which a bankruptcy case is commenced has "*exclusive* jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. §1334(d). [Emphasis Added]. Section 726 guarantees that distribution of property of the estate will be handled by the Bankruptcy Court. Section 549, by its language, expressly provides that the Bankruptcy Court, having obtained jurisdiction over the property at the commencement of the case, retains jurisdiction over the property until it is distributed in accordance with the distributive provisions of the Bankruptcy Code. With very narrow exceptions, §549 authorizes the recovery of all post-petition transfers not authorized by the Bankruptcy Code or the Bankruptcy Court. An adversary proceeding to recover such an unauthorized post-petition transfer arises solely from substantive bankruptcy law and is, therefore, exclusively within the jurisdiction of the Bankruptcy Court.

This case involves an unauthorized post-petition transfer of property of the bankruptcy estate by an officer of the Debtor, then acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, to an agency of the United States, the IRS, in payment of the personal tax obligation of the defalcating officer. There is neither a question, nor an issue, that the transfer to the United States sought to be avoided by the Trustee occurred post-petition and involved property of

the estate. Petitioner has never suggested, and the record is devoid of any indicia or suggestion, that the complained of post-petition transfer was authorized by the Bankruptcy Court or under any provision of the Bankruptcy Code.

In *Whiting Pools* this Court first concluded that the Bankruptcy Code generally authorizes the recovery of property of the estate seized prior to the commencement of the bankruptcy case. *Whiting Pools*, 103 S. Ct. at 2312-15. It then determined, by a simple and direct analysis, that the result was not different when the creditor was the United States. *Whiting Pools*, 103 S. Ct. at 2315-16. It is obvious from the foregoing that §549(a) generally authorizes the recovery of property of the estate transferred post-petition and without authorization by the Bankruptcy Court or the Bankruptcy Code. Section 550(a) authorizes recovery from an "entity." The Bankruptcy Code expressly states that the term "entity" includes a governmental unit. 11 U.S.C. §101(14). The conclusion is clear, as this Court held in *Whiting Pools*, that there is "no reason why a different result should obtain when the IRS is the creditor." *Whiting Pools*, 103 S. Ct. at 2315.

Petitioner alleges that there should be a different result when the United States is the creditor. The essence of Petitioner's argument is that the management of a debtor in possession should be allowed to steal money from the bankruptcy estate and transfer the money to the government in satisfaction of personal tax obligations, and that the Bankruptcy Court cannot look to the government as the beneficiary of the funds for recovery. Nothing in the Bankruptcy Code or in its legislative history indicates that Congress intended to except the United States from the ambit of §549. Indeed, as noted above, the express language of the Code mandates that the United States be treated like any other creditor. To hold otherwise would be in violation of those provisions that grant the Bankruptcy Court control over the cases that it administers and would frustrate a fundamental policy of bankruptcy law: equality of distribution to creditors. Consequently, the Sixth Circuit Court of Appeals correctly affirmed the decisions of the lower courts in this case.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT §§550 AND 106 OF THE BANKRUPTCY CODE AUTHORIZE SUITS BY A TRUSTEE IN BANKRUPTCY TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS OF PROPERTY OF THE BANKRUPTCY ESTATE FROM THE UNITED STATES NOTWITHSTANDING ANY ASSERTION OF SOVEREIGN IMMUNITY BY THE UNITED STATES.

As seen above, the decision of the Sixth Circuit Court of Appeals can be affirmed under the reasoning that this Court adopted in *Whiting Pools*,without reference to the express waiver of sovereign immunity contained in the Bankruptcy Code, 11 U.S.C. §106. The Sixth Circuit, however, grounded its ruling in an interpretation of §106(c) of the Bankruptcy Code, holding that "[s]ection 106 is a straight-forward and specific waiver of sovereign immunity as it relates to *federal* governmental units." [Emphasis added]. (Petition, App., 6a). The Sixth Circuit specifically found that "Sections 550 and 106 authorize suits by the Trustee to recover a transfer of the type involved here from the IRS regardless of sovereign immunity", (Petition, App., 6a).

Petitioner now asks this Court to review the Sixth Circuit's holding in the present case to determine the

extent to which §106(c) waives the sovereign immunity of the Federal Government. Petitioner alleges consideration of this issue is necessary because of the existence of a conflict between the Sixth Circuit and the Eighth Circuit as to the scope of the waiver of federal sovereign immunity under §106(c), because the broad interpretation of §106(c) adopted by the Sixth Circuit exposes the United States to claims for monetary recovery under a wider variety of Bankruptcy Code provisions, and because it believes the Sixth's Circuit's interpretation of §106(c) is incorrect as a matter of law.

A. There Is No Real Conflict Between The Circuits As To Whether 106(c) Waives The Sovereign Immunity Of The United States To Actions To Recover Property Of The Estate.

Petitioner contends that the decision of the Sixth Circuit directly conflicts with the Eighth Circuit's decision in *SBA v. Rinehart*, 887 F2d 165 (1989), and with the interpretation of §106(c) adopted by a plurality of this Court in *Hoffman v. Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989). However, the conflict between the Circuits, which the petitioner alleges, is neither apparent nor real. *SBA v. Rinehart* is distinguishable on its facts from this case. Furthermore, the holding of the Eighth Circuit in *SBA v. Rinehart*, adopting without analysis or explication of a rationale the interpretation of §106(c) urged by the *Hoffman* plurality, is suspect.

In *SBA v. Rinehart*, the Eighth Circuit addressed the power of a Bankruptcy Court to award punitive damages against the Small Business Administration, an agency of the United States, for violation of the Bankruptcy Code's automatic stay provision, 11 U.S.C. §362(a). In the instant case, no punitive damages were assessed and no violations of the automatic stay alleged. Here, the

Trustee in Bankruptcy simply seeks to recover property which was undeniably property of the estate, transferred post-petition to the IRS without authorization by the Bankruptcy Court or under any provision of the Bankruptcy Code. No other Circuit Court has addressed the issue of whether a Trustee in Bankruptcy can recover an unauthorized, post-petition transfer of property of the estate from the United States or any of its agencies. Thus, as a factual matter, there can be no conflict between the Circuits on this issue.

Admittedly, the Eighth Circuit in *SBA v. Rinehart* concluded that the *Hoffman* analysis "is equally applicable to a waiver of sovereign immunity by the federal government." *SBA v. Rinehart*, 887 F.2d at 170. However, the Eighth Circuit's holding was merely conclusory. Without either explicating a rationale or undertaking an analysis, the Court of Appeals adopted a construction of §106(c) in which only four of nine justices concurred. "[W]hile other courts have found this rationale sufficient, see [*SBA v. Rinehart*], at 169-70, *we know that four is less than five.*" [Emphasis added]. *In re Pearson*, 917 F2d 1215, 1216 (9th Cir. 1990), petition for cert. pending., No. 90-1208.

What is absolutely clear is that the Eighth Circuit need not have reached the issue of the scope of the waiver of sovereign immunity under §106(c) of the Bankruptcy Code in *SBA v. Rinehart*. The award of punitive damages for violation of the automatic stay is authorized by §362(h) of the Bankruptcy Code. Section 362(h) provides that "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. §362(h). Section 106(c)(1), the express statutory waiver of sovereign

immunity contained in the Bankruptcy Code, provides that "a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units." 11 U.S.C. §106(c)(1). As is noted by the Ninth Circuit in *In re Pearson*, 917 F2d at 1216 and by the dissent in *Hoffman*, 109 S. Ct. at 2826 n.4 (Marshall, J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting), §362(h) does not contain any of the trigger words found in §106(c)(1) and therefore does not apply to governmental units. It is obvious that the Eighth Circuit could have concluded that Congress did not waive sovereign immunity of the United States to punitive damages under §362(h) without considering the extent of the waiver of sovereign immunity contained in §106(c). Since the reasoning of the Eighth Circuit is suspect and constitutes mere dicta, there is no real conflict between the Circuits on the issue of federal sovereign immunity under §106(c).

B. Since Only A Handful Of The Provisions Made Applicable To The United States By Operation Of §106(c) Envision Monetary Recovery, The United States Does Not Confront Claims For Monetary Recovery Pursuant To A Wide Range Of Bankruptcy Code Provisions Under The Sixth Circuit's Interpretation Of The Statute.

Petitioner alleges that under the reading of §106(c) adopted by the Sixth Circuit Court of Appeals, the United States confronts claims for monetary recovery pursuant to a wide variety of Code provisions: "[T]he only limit is the number of provisions of the Bankruptcy Code containing one of the trigger words. With this 'limit,' §106(c) would apply in a scattershot fashion to over 100 Code provisions." (Petitioner's Brief - p.12 - 13) (Quoting *Hoffman*, 109 S. Ct. at 2822).

Petitioner's allegation does not stand up under scrutiny. First, most of the "over one hundred code provisions" containing the trigger words specified in §106(c)(1) do not provide for monetary recovery from the sovereign. *Hoffman*, 109 S. Ct. at 2826 (Marshall, J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting). Many of these provisions grant rights to the sovereign and provide no remedies to the Debtor.[3] Others provide remedies to the Debtor, but by their express language provide only for declaratory or injunctive relief.[4]

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[3]See, e.g., §303(b)(1) (permitting three or more "entities" to file an involuntary case against the debtor); §303(c) (giving "creditors" who do not file an involuntary case the same rights as those who do); §303(j) (requiring notice to all "creditors" before a Court may dismiss an involuntary case); §341(a) (requiring a meeting of "creditors"); §343 (permitting "creditors" to examine the Debtor); §349(b)(3) (revesting property in an "entity" if the petition is dismissed); §361 (setting forth adequate protection for certain property interest of an "entity"); §363(c)(2)(A) (preventing use, lease, or sale of cash collateral assets absent consent of an interested "entity"); §§501 and 502 (regulating filing of proofs of claims by "creditors"); §506(a) (granting secure status to lien "creditors"); §553 (granting rights of setoff to certain "creditors"); §§702(a) and 705 (giving qualified "creditors" the right to vote for the Trustee and the Creditors' Committee); §§507 and 726 (setting forth priorities of distribution to "creditors"); §727(c) (giving a "creditor" the right to object to a discharge); §1102 (providing for Court appointed creditors' committee); §1109(b) (giving a "creditor" the right to be heard on any issue); §1121(c) (providing that a "creditor" may file a reorganization plan). *Hoffman*, 109 S. Ct. at 2826 n.2 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[4]See, e.g., §365 (permitting the Trustee to assume or reject his executory contracts and unexpired leases in certain circumstances); §505 (permitting the Bankruptcy Court to determine the Debtor's tax liability in certain circumstances); §525 (protecting the Debtor against government discrimination in licensing and employment); §1141 (binding "creditors" to the terms of a con-

Only a *handful* of the "over one hundred code provisions" containing the "trigger" words clearly contemplate money judgments against a "creditor," "entity," or "governmental unit." *Hoffman*, 109 S. Ct. at 2826 (Marshall J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting). Indeed, Petitioner in its Brief only identified three provisions which under the Sixth Circuit's interpretation would authorize monetary awards against the Federal Government: section 549 involving post-petition transfers; §547 involving pre-petition preferential transfers;[5] and claims for the "turnover" of funds. (Petition, p. 13, n. 15).[6]

firmed reorganization plan and discharging all other claims); §1142 (permitting the Bankruptcy Court to require performance of any act necessary to carry out a confirmed reorganization plan); §1143 (preventing an "entity" that fails to perform a required act from participating in the distribution of estate assets). *Hoffman*, 109 S. Ct. at 2826 n.3 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[5]The exposure of the United States to adversary proceedings brought under §547 of the Bankruptcy Code was severely limited by this Court's ruling in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990). In *Begier*, a unanimous Court held that pre-petition payments of trust fund taxes to the IRS could not be avoided as preferences as such payments did not constitute transfers of property of the estate but were, instead, transfers of property held in trust for the government. Obviously, under *Begier*, pre-petition payments of non-trust fund taxes may still be avoidable as preferential. In *Begier*, a matter affecting the federal fisc, this Court made an extensive analysis of the legislative history of §§541 and 547 of the Bankruptcy Code. The legislative history of §547 clearly reflects that Congress intended that the Bankruptcy Code authorize a Trustee to bring suit against the United States for both the avoidance and recovery of preferential tax payments. (See H.R. Rep. No. 95-595, at 373, U.S. Code Cong. ¶ Admin. News, 1978, p. 6329).

[6]As discussed above, this Court has previously dealt with the applicability of the Bankruptcy Code provision dealing with the turnover of property to the estate. §542 of the Bankruptcy Code, in *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309, 2315 (1983)

C. The Sixth Circuit's Conclusion That §§550 And 106 Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The Federal Government Is Fully Supported By The Language Of §106(c), The Language Of The Bankruptcy Code Provisions Containing The Trigger Words Specified In §106(c)(1), And The Legislative History.

Section 106 of the Bankruptcy Code is clearly designated a "Waiver of Sovereign Immunity". 11 U.S.C. §106. By its express language, §106(c) provides that:

> notwithstanding *any* assertion of sovereign immunity —
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units. [Emphasis added].

11 U.S.C. §106(c). The Sixth Circuit Court of Appeals found in this case that §106 was a straight-forward and specific waiver of sovereign immunity as it relates to federal governmental units and that nothing in the provision suggests that the waiver of sovereign immunity is limited to injunctive or declaratory relief. *In re Nordic Village*, (Petition, App., 6a-7a). Petitioner specif-

holding therein that the Internal Revenue Service, an agency of the Federal Government, is bound by §542(a) to the same extent as any other secured creditor. Section 542(a) expressly provides that for the turnover of property of the estate "...or the value of such property" and therefore clearly grants the Bankruptcy Court authority to enter an affirmative monetary judgment, reflecting the value of the property of the estate, against any creditor in possession of such property.

ically asks this court to examine the extent and meaning of this express statutory waiver of sovereign immunity as it relates to the United States.

This Court recently considered the language of §106(c) in *Hoffman v. Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989), a case involving the sovereign immunity of the States. In that case a plurality of a sharply divided Court concluded that the language of §106(c) did not abrogate the Eleventh Amendment immunity of the States to actions for monetary relief where the State did not waive sovereign immunity by filing a proof of claim. *Hoffman*, 109 S. Ct. at 2824. Petitioner posits that the analysis adopted by the plurality in *Hoffman*, and subsequently by the Eighth Circuit in *SBA v. Rinehart*, should apply in this case. (Petition - p. 11).

A simple examination of the opinions entered by this Court in *Hoffman* indicates that the case contained no controlling analysis of §106(c) of the Bankruptcy Code. Four Justices, in an opinion by Justice White, concluded that §106(c) did not abrogate the sovereign immunity of the States as Congressional intent to do so was not unmistakably clear in the language of the statute. *Hoffman*, 109 S. Ct. at 2823. Four Justices, in an opinion by Justice Marshall, held that Congress had clearly expressed its intent to abrogate the Eleventh Amendment immunity of the States and that §106(c) did authorize a bankruptcy court to issue a money judgment against a State that has not filed a proof of claim in a bankruptcy proceeding. *Hoffman*, 109 S. Ct. at 2824-25 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting). The deciding vote was delivered by Justice Scalia, who did not construe the statute, concluding instead that Congress did not have the power to abrogate the State's Eleventh Amendment

immunity and therefore Congressional intent to do so was irrelevant. *Hoffman*, 109 S. Ct. at 2824. The opinion of an equally divided court is entitled to no precedential value. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *TWA, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977); *Neil v. Biggers*, 409 U.S. 188, 192 (1972); see also, *In re Pearson*, 917 F.2d at 1216 ("While other courts have found this rationale sufficient, we know that four is less than five.").

An examination of the analysis adopted by the plurality in *Hoffman* clearly indicates that the case is to be narrowly construed. The issue presented was "whether §106(c) of the Bankruptcy Code, 11 U.S.C. §106(c), authorizes a bankruptcy court to issue a money judgment against a *State* that has not filed a proof of claim in the bankruptcy proceeding." [Emphasis added]. *Hoffman*, 109 S. Ct. at 2821. The standard applied by the plurality was whether Congress had made its intent to abrogate the *States'* Eleventh Amendment immunity "unmistakably clear in the language of the statute." *Hoffman*, 109 S. Ct. at 2822 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The plurality held that "in enacting §106(c) Congress did not abrogate the Eleventh Amendment immunity of the *States*" further emphasizing the narrowness of the issue it was deciding. [Emphasis added]. *Hoffman*, 109 S. Ct. at 2824.

The present case deals with the sovereign immunity of the United States. The Eleventh Amendment does not apply to the United States. Congressional power to abrogate the States' Eleventh Amendment immunity is not at issue. Congressional power to waive the sovereign immunity of the United States is undisputed. Thus, the Sixth Circuit correctly concluded that *Hoffman*, was not

precedent in this case. *Nordic Village*, (Petition, App. 10a).[7]

It is true that under common law sovereign immunity the United States, like the States, has an interest in being free from suit. However there is a distinction between common law sovereign immunity and the constitutional protections of the Eleventh Amendment. Common law sovereign immunity protects the government from a suit brought by one of its own citizens. A waiver of common law sovereign immunity goes to "whether" or "when" the government may be sued. The Eleventh Amendment, on the other hand, is a specific Constitutional provision which prohibits suits against the States in federal court. *In re Lawson Burich Association: Inc.*, 59 B.R. 681, 687 n. 8 (Bankr. S.D. N.Y. 1986),

[7]Numerous other courts have also concluded that *Hoffman* is not applicable in a case involving the United States. In *In re Simmons*, 110 B.R. 72, 73 (Bankr. M.D. Fla. 1990) the bankruptcy court held that "The [Internal Revenue Service's] reliance upon *Hoffman* is inapposite. The holding in *Hoffman*, like the [Eleventh] [A]mendment, does not apply to the federal government. *Hoffman* simply holds that a state is immune from damage claims of the Trustee under the [Eleventh] [A]mendment." Similarly, in *In re Iverson*, 108 B.R. 272, 273 (Bankr. D. Or. 1989) the bankruptcy court concluded that "The government misreads *Hoffman*. The Court did not under any reasonable construction reduce jurisdiction in cases against the United States such as *United States v. Whiting Pools, Inc.*, . . . where there is clear Congressional consent to liability and a substantive waiver of sovereign immunity." In *In re Price*, 103 B.R. 989, 994 (Bankr. N.D. Ill. 1989) aff'd. *In re Price* -- B.R. --- (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796), the bankruptcy court, in a decision recently affirmed by the district court, held that "The IRS's reliance on *Hoffman* is inapposite. The holding in *Hoffman* does not apply to the federal government. . . . The Supreme Court, interpreting the section 106 waiver of sovereign immunity narrowly, held that §106(c) should not be read to abrogate the [Eleventh] [A]mendment immunity of the state where the state has not voluntarily consented to a waiver."

(citing *Pennhurst State School and Hospital v. Halderman*, 104 S. Ct. 900, (1984)); *In re 995 Fifth Ave. Associates, L.P.*, 116 B.R. 384, 390 n. 5 (Bankr. S.D.N.Y. 1990). The Eleventh Amendment thus speaks to the forum in which a State may be sued and this Court has required plaintiffs to meet a stringent standard in demonstrating Congressional intent to abrogate this Eleventh Amendment immunity so that a State may be sued in federal court. (See *Atascadero*, 105 S. Ct. at 3148; *Pennhurst State School*, 104 S. Ct at 907). There is no analogous choice of forum problem where the United States or its agencies are sued in federal court. Therefore, Petitioner's assertion that the Sixth Circuit should have determined whether an intent to waive federal sovereign immunity from monetary recovery was unmistakably clear in the language of the statute, is incorrect as a matter of law. (Petition, p.15).

Protestations of the Petitioner to the contrary, this case involves a simple matter of statutory interpretation, involving a Congressional waiver of the sovereign immunity of the United States. It is well settled that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, as was recently noted by this Court, "the text is only the starting point. . . . 'in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 107 S. Ct. 353, 358 (1986) (citations omitted).

Section 106 of the Bankruptcy Code provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same

transaction or occurrence out of which such governmental unit's arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsection (a) and (b) of this section and notwithstanding any assertion of sovereign immunity —

(1) A provision of this title that contains "creditor", "entity", or "governmental unit", applies to governmental units; and

(2) A determination by the Court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106. It is clear on the face of §106(c), by the use of the language "notwithstanding any assertion of sovereign immunity" that Congress intended to waive any claim of sovereign immunity for the United States under any section of the code containing one of the trigger words.[5]

The scope of the waiver of sovereign immunity found in §106(c) of the Bankruptcy Code can only be determined by reference to the Code provisions con-

[5]Besides the Sixth Circuit in this case, numerous Courts have concluded that Congress intended to waive any assertion of sovereign immunity by the Federal Government under any section containing the trigger words listed in §106(c)(1). See, *Neuweiler v. Schweiker*, 674 F2d 1201, 1202-1204 (7th Cir. 1982); *Gingold v. United States*, 80 B.R. 555, 561 (Bankr. N.D. Ga. 1987); *R & L. Refunds v. United States*, 45 B.R. 733, 735 (Bankr. W.D. Ky. 1985); *Gower v. Farmers Home Administration*, 20 B.R. 519, 521-522 (Bankr. N.D. Ga. 1982); *Remke, Inc. v. United States*, 5 B.R. 299, 300-302 (Bankr. E.D. Mich. 1980).

taining the trigger words "creditor," "entity," and "governmental unit." *Hoffman*, 109 S. Ct. at 2826 (Marshall J., joined by Brennan, Blackmun and Stevens, J.J. dissenting). Section 550 of the Bankruptcy Code is a provision containing one of the trigger words. Section 550 provides, in part:

(a) Except as otherwise provided, in this section, to the extent that a transfer is avoided under §§544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the Trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, the value of such property, from —

(1) The initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) Any immediate or mediate transferee of such initial transferee.

11 U.S.C. §550(a). Since §550(a) contains one of the trigger words it is applicable to the United States.

Furthermore, the express language of §550(a) provides that "the Trustee may recover, for the benefit of the estate, the property transferred, *or, if the Court so orders, the value of such property*, . . ". [Emphasis added]. 11 U.S.C. §550(a). Similarly, §542(a) provides, in pertinent part, "that an "entity"... shall deliver to the Trustee, . . such property or *the value of such property*. . ." 11 U.S.C. §542(a). By authorizing the "recovery" of the "value" of the property transferred, the statute clearly indicates Congressional intent to waive the sovereign immunity of the United States to actions in Bankruptcy Court seeking monetary recovery.

Congressional intent to waive sovereign immunity and the scope of such a waiver can only be ascertained

by reference to the underlying Congressional policy. *Keifer and Keifer v. Reconstruction Finance Corp.*, 59 S. Ct. 516, 517 (1939). Legislative history should also be thoroughly considered in any inquiry to determine Congressional intent. *Flora v. United States*, 357 U.S. 63, 65 (1958), aff'd after reh'g, 362 U.S. 145, reh'g denied, 362 U.S. 972 (1960); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 104 S. Ct. 2549, 2554 (1984).

The legislative history of §106(c) further supports the interpretation of that provision adopted by the Sixth Circuit in this case. The statement on §106(c) provided as follows:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in Title 11 applied to governmental units notwithstanding any assertion of sovereign immunity in that an order of the court binds governmental units. *The provision is included to comply with the requirements in case law that an express waiver of sovereign immunity is required in order to be effective.* Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and the dischargeability of tax liabilities owing by the debtor or the estate prior to or during the bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in §§106(a) and 106(b), *subsection (c) is not limited to these issues, but permits a bankruptcy court to bind governmental units on other matters as well. For*

> *example, §106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the house report to H.R. 8200 is thereby overruled.* [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Subsequent statements by the floor managers added:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini).

As is noted by Justice Stevens in his analysis of the legislative history of §106(c):

> Although the primary object of §106(c) was to provide the bankruptcy court with authority to determine the amount and dischargeability of tax liabilities even if a claim has not been filed, the legislative history thus indicates that the provision was also intended to cover "other matters as well" including specifically the avoidance of preferential transfers. *There was no suggestion that this authority did not include the power to order the return of real property and the payment of money damages or that*

> *the issues that the bankruptcy court could determine under §106(c) were limited to whether prospective or declaratory relief was appropriate.* [Emphasis added].

Hoffman, 109 S. Ct. at 2828 (Stevens, J., joined by Blackmun, J., dissenting).

Both the language of the statute and the legislative history indicated that Congress intended §106(c) to be a straight-forward and specific waiver of sovereign immunity as it relates to the United States. Petitioner's reliance on a crabbed construction of §106(c) overlooks this Court's admonition that a waiver of sovereign immunity is accomplished not by a ritualistic formula but by reference to underlying Congressional policy. *Keifer and Keifer*, 59 S. Ct. at 517. Where, as here, the federal government waives sovereign immunity, the scope of that waiver is to be construed liberally to effect its remedial purposes. *Hoffman*, 109 S. Ct. at 2829 (Stevens, J., joined by Blackmun, J. dissenting). As stated by this Court in *Block v. Neal*, 103 S. Ct. 1089, 1094 (1983) "The exemption of the sovereign from a suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Thus, since the Sixth Circuit's analysis of §106(c) is supported by the statute and the legislative history, the decision below was correct and the petition for a writ of certiorari filed by the United States should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 90-1629

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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---

1. Contrary to respondent's contention (Br. in Opp. 1, 4-6), this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), does not address the question presented here. The question presented here is whether Section 106(c) of the Bankruptcy Code (11 U.S.C. 106(c)) authorizes an award of monetary relief against the federal government. In contrast, *Whiting Pools* concerned the authority of a bankruptcy court to order the Internal Revenue Service to turn over to the estate property that the IRS had seized from the debtor to satisfy tax liabilities.[1]

---

[1] In *Whiting Pools*, the IRS seized a company's tangible property – "equipment, vehicles, inventory, and office supplies" (462 U.S. at 200) – to satisfy the company's tax liabilities. As this Court's opinion emphasized, the business retained ownership of the property after the IRS gained possession of it. *Id.* at 200, 211. Under these circumstances,

Whiting Pools did not involve an award of monetary relief, and no issue of sovereign immunity under Section 106(c) was presented or discussed. *Whiting Pools* thus does not control here.[2]

2. Respondent is incorrect in asserting (Br. in Opp. 14) that there is "no[ ] real" conflict between the Sixth Circuit's decision in this case and the Eighth Circuit's decision in *SBA* v. *Rinehart*, 887 F.2d 165 (1989). Those decisions directly address whether Section 106(c) authorizes an award of monetary relief against the United States and come to opposite conclusions. The Eighth Circuit in *Rinehart* applied the analysis of the plurality in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), to hold that Section 106(c) does *not* waive the federal government's sovereign immunity from monetary relief. 887 F.2d at 166-170. The Sixth Circuit here applied the analysis of the dissent in *Hoffman* to hold that Section 106(c) *does*

---

the Court held, a bankruptcy court could order the IRS to turn the property over to the estate pursuant to Section 542(a) of the Code. 462 U.S. at 209-211. 11 U.S.C. 542(a) provides in relevant part:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

[2] *Whiting Pools* is relevant insofar as the Court upheld an injunctive-style order of the sort that in our view is permissible under Section 106(c). As we explained in our petition (Pet. 16-18), Section 106(c) authorizes courts to make binding determinations regarding the government's rights as a creditor of the estate. The order at issue in *Whiting Pools* amounted to a determination that the IRS "[was] require[d] * * * to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." 462 U.S. at 212.

authorize monetary relief against the federal government. The conflict is obvious and direct.

Respondent concedes (Br. in Opp. 15) that the *Rinehart* court "concluded that the *Hoffman* [plurality's] analysis 'is equally applicable to a waiver of sovereign immunity by the federal government'" (*Ibid.* (quoting *Rinehart*, 887 F.2d at 170))—a conclusion directly at odds with that of the Sixth Circuit here. Respondent nonetheless asserts that the *Rinehart* court could have decided the issue before it without reaching the sovereign immunity question, by holding that the Bankruptcy Code provision on which the claim for monetary relief there was based—the automatic stay provision (11 U.S.C. 362)—does not contain any of the trigger words on which the applicability of Section 106(c) depends. Br. in Opp. 15. Respondent observes (*id.* at 16) that this alternative rationale was used by the Ninth Circuit in *In re Pearson*, 917 F.2d 1215 (1990), petition for cert. pending, No. 90-1208, to deny a claim for money damages against the United States.

Respondent's argument does not dispel the conflict that exists between the Sixth and the Eighth Circuits with respect to the issue presented here. First, respondent's argument assumes that *Pearson* was correctly decided; that assumption is premature given the request for further review of *Pearson* pending before this Court, No. 90-1208.[3] Moreover, respondent's reliance on *Pearson* is particularly unwarranted in light of the Ninth Circuit's statement in that case that "the plurality's reasoning [in *Hoffman*] is equally applicable to the immunity of the United States." 917 F.2d at 1216. That conclusion squarely contradicts the Sixth Circuit's conclusion in this case.

---

[3] The United States has filed a brief with this Court in *Pearson* stating that, while we agree with the Ninth Circuit's decision in that case, we believe the petition should be held pending disposition of our petition in the present case.

3. Respondent unwittingly refutes its own argument (Br. in Opp. 16-18) that the question presented here arises too infrequently to warrant further review. As respondent admits, "numerous" courts have addressed the scope of federal sovereign immunity under Section 106(c) (Br. in Opp. 24 n.8), and "[n]umerous other courts" have specifically considered whether the reasoning in *Hoffman* controls on this issue (*id.* at 22 n.7). The decisions cited by respondent more or less support the Sixth Circuit's decision in this case. Other decisions squarely conflict with the decision below.[4]

As explained in the petition (Pet. 6-8, 11-13), this conflict among the lower courts results from the fact—acknowledged by respondent (Br. in Opp. 20)—that no interpretation of Section 106(c) commanded majority support in *Hoffman*, and that the scope of *federal* sovereign immunity was not directly addressed. In light of the United States' frequent status as a creditor in bankruptcy proceedings, the present conflict among the lower courts over the scope of federal sovereign immunity under Section 106(c) should be resolved by this Court.[5]

---

[4] *In re Woloschak Farms*, 109 Bankr. 736 (N.D. Ohio 1989); *In re Academy Answering Service, Inc.*, 100 Bankr. 327 (N.D. Ohio 1989); *In re Cowart*, No. 88-40382, Adversary No. 90-4093 (Bankr. S.D. Ga. Dec. 4, 1990); *In re Bradford*, No. 289-00536, Adversary No. 289-0211 (Bankr. E.D. Cal. Aug. 23, 1990); *In re Bryant*, 116 Bankr. 272, 275-276 (Bankr. D. Kan. 1990); cf. *In re Lile*, 103 Bankr. 830 (Bankr. S.D. Tex. 1989), appeal pending, No. CA-H-89-3463 (S.D. Tex.).

[5] Respondent notes (Br. in Opp. 18) that most of the provisions in the Bankruptcy Code that contain one of the trigger words in Section 106(c)—"creditor," "entity," or "governmental unit"—do not contemplate money judgments. The dissent in *Hoffman* made the same observation, 492 U.S. at 108-109, but that did not prevent the Court from granting review in *Hoffman* to decide the issue of Eleventh Amendment immunity presented there. The issue of federal sovereign immunity presented here is of equal importance. In any event, the proportion of Code provisions containing trigger words is unrelated to the frequency with which claims against the sovereign for money damages may arise. For example, Section 542(b) is one of the Code provisions that contains a trigger word and contemplates monetary awards; it authorizes the trustee to bring contract actions against any "entity." 11 U.S.C. 542(b). This provision obviously could provide a basis for innumerable claims against the government for money damages.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

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THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 23, 1991
CERTIORARI GRANTED JUNE 17, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

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TABLE OF CONTENTS [1]

		Page
1.	Bankruptcy Court Docket Entries	1
2.	District Court Docket Entries	6
3.	Court of Appeals Docket Entries	8
4.	Complaint filed December 7, 1984	13
5.	Answer filed January 16, 1985	17
6.	Order Granting Certiorari dated June 17, 1991	19

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[1] The opinion of the court of appeals, the order of the court of appeals denying rehearing, the judgment of the court of appeals, the orders and judgments of the district court, and the orders and judgments of the bankruptcy court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. B84-771

IN RE: NORDIC VILLAGE, INC.,
dba SWISS HAUS, DEBTOR

Adv. No. B84-694

DAVID O. SIMON, TRUSTEE, PLAINTIFF

v.

JOHN HOWARD, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
12/7/84	1	COMPLAINT TO AVOID POST-PETITION TRANSFERS OF PROPERTY OF THE ESTATE FILED. 3 JA
12/11/84	2	Summons and notice of pre-trial issued. January 16, 1985 @ 1:30 p.m. ja
12/12/84	3	Certification of service filed. ja
1/16/85	4	Answer of Robert E. Martin, Lake County Treasurer, filed with proof of service. mp 4
1/16/85	5	Complaint to avoid post-petition transfers of property of the estate—Partly held and Adj. to 2-13-85 @ 1:30 p.m. Minutes filed. ja
1/16/85	6	Answer of Federal Defendant, Dept. of Treasury, Internal Revenue Service, by its attorney, Patrick M. McLaughlin filed. 15 ja

DATE	NR	PROCEEDINGS
1/21/85	7	Answer and cross-claim of defendant, State of Ohio, Dept. of Taxation filed. ja
1/21/85	8	Stipulation between the trustee and the defendant, John Howard, extending time for the defendant to answer complaint for the period of 20 days filed. ja
1/23/85	9	Order entered that the stipulation between the trustee and the defendant, John Howard, is approved and that the time of the defendant, John Howard, to answer complaint is extended for 20 days from the date hereof. (Noted: 1-25-85) ja
1/25/85	10	Letter from David O. Simon advising that the continued pre-trial has been scheduled for 2-13-85 @ 1:30 p.m., filed. ja
2/13/85	11	Complaint to avoid post-petition transfers of property of the estate—Adj. to 2/27/85 @ 3:00 p.m. Minutes filed. ja
2/13/85	12	Letter from David O. Simon advising that the continued pre-trial has been scheduled for 2-27-85 @ 3:00 p.m., filed. ja
2/15/85	13	Answer to cross claim of defendant, John Howard filed. ja
2/15/85	14	Answer of defendant, John Howard to complaint to avoid post-petition transfers of property of the estate filed. ja
2/26/85	15	Notice of withdrawal of trial attorney James C. DeBoard with approval of Judge Alice M. Batchelder filed. ja
2/27/85	16	Complaint to avoid post-petition transfers of property of the estate—Adj. to April 22, 1985 @ 9:30 a.m. Minutes filed. ja

DATE	NR	PROCEEDINGS
2/27/85	17	Notice that the complaint to avoid post-petition transfers of property of the estate will come on for trial on April 22, 1985 @ 9:30 a.m. filed. ja
3/13/85	18	Motion of David O. Simon, Trustee for judgment on pleadings against the State of Ohio, Dept. of Taxation with memorandum in support and certificate of service filed. ja
3/15/85	19	Stipulations of the parties, David O. Simon, Trustee, plaintiff; and Department of the Treasury, IRS, defendant filed. 18 ja
3/19/85	20	Stipulations of the parties, David O. Simon, Trustee, Plaintiff, and Robert E. Martin, Lake County Treasury, defendant filed. 6 ja
3/27/85	21	Trustee's brief in support of avoidance of post-petition transfers of property of the estate. 8 ja
3/27/85	22	Brief of Robert E. Martin, Lake County Treasurer relative to plaintiff's complaint filed. 7 ja
3/27/85	23	Brief of the United States of America relative to plaintiff's complaint filed. 14 ja
4/03/85	24	Memorandum of Decision and Order completed by Alice M. Batchelder, U.S. Bankruptcy Judge, filed. RU 9
4/3/85	25	Judgment Order entered in favor of the Trustee and against the defendant, the Internal Revenue Service, in the sum of $20,000.00 and against the defendant Lake County Treasurer, in the sum of $10,070.32. 10 (Noted 4/3/85) RU
4/12/85	26	Notice of Appeal To District Court on the Order dated 4/3/85 in which the United States of America was ordered to turnover $20,000.00 to the Estate of debtor over the objection of the United States, filed. RU 11

DATE	NR	PROCEEDINGS
4/17/85	27	Notice of Adjourned Hearing on the Complaint to Avoid Post-Petition Transfers of Property of the Estate has been adjourned from April 22, 1985 to *May 31, 1985 at 9:00 A.M.* in Courtroom 420, filed.
4/16/85	28	Answer of Defendant, Huntington National Bank of Northeast Ohio to Complaint For An Accounting and Avoidance of Post-Petition Transfers of Property of the Estate with Certificate of Service, filed. RU
4/22/85	29	Notice of Appeal to the District Court of Robert Martin, Lake County Treasurer with names and addresses of interested parties, filed. RU 12
4/19/85	30	Appellant United States of America's Designation of the Contents for Inclusion In The Record on Appeal and Statement of the Issues Intended to be Presented on Appeal From the Order Dated 4/03/85, filed. RU 19
4/30/85	31	Appellant, Robert E. Martin, Lake County Treasurer's Designation of the Contents For Inclusion In the Record on Appeal and Statement Of the Issues Intended to be Presented on Appeal from the Order dated April 3, 1985, filed. 13 RU
5/20/85	32	Notice of appeal submitted to USDC, assigned to Judge Battisti and given case No. C 85-1483
5/31/85		Hearing on Complaint to Avoid Post-Petition Transfer of Property of the Estate—Judgment for Plaintiff—OSJ 6-13-85. RU
6/13/85	33	Judgment entered By Default Against John Howard with Certificate of Service by clerk's office. (Noted 6/20/85) RU

DATE	NR	PROCEEDINGS
6/13/85	34	Supplemental Judgment entered on Pleadings Against The State of Ohio, Department of Taxation with Certification of Service by Clerk's office. (Noted 6/20/85) RU
2/26/86	35	Order and Judgment entry entered that the appellant's appeal from the Bankruptcy Court is denied and the judgment of the Bankruptcy Court as reflected in its memorandum of decision is hereby affirmed.
4/6/88		BC-6 completed and adversary proceeding closed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 85-1483

IN RE: NORDIC VILLAGE, INC.,
dba SWISS HAUS, DEBTOR

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5/20/85	1	ORIGINAL Pleadings & certified copy of docket entries in case no. B84-771, adv. B84-694 rec'd. from Clerk of U.S. Bankruptcy Ct. for the N.D. of Oh., E. Div. and filed.
6/5/85	2	STIPULATION & ORDER Granting Appellants an extension of time until 7/5/85 to the their briefs and granting appellee leave of 15 da. from date of service of said brief to file his brief, filed. Battisti, J.* Copies issued. (noted 6/5/85). *[by JW., D. Clk].
7/2/85	3	BRIEF of Appellant, USA, filed. Copies mailed 7/1/85.
7/5/85	4	MOTION of Appellee, Simon, Trustee, for extension of time of 15 da. following the filing of The Lake Co. Treasurer's brief, with memorandum in support, filed. Copies mailed 7/5/85.
7/5/85	5	BRIEF of Appellant, Robert E. Martin, Lake Co., Trea., filed. Copies mailed 7/5/85.
7/12/85	6	LETTER from Asst. Prosecutor Krantz dtd 7/10/85 correcting grammatical errors in the Lake Co. Treasurer's Brief, filed. Copies mailed 7/10/85.

DATE	NR	PROCEEDINGS
7/22/85	7	BRIEF of Appellee, David O. Simon, Trustee, filed. Copies mailed 7/19/85.
10/2/85		CASE Reassigned to Judge Lambros purs. to Administrative Order.
2/26/86	8	ORDER that the appeal is denied and the judgment of the Bankruptcy Judge is affirmed; this action is terminated, filed. Lambros, J. c/m 2/26/86 (2/27/86)
2/26/86	9	JUDGMENT entered that the appellants' appeal from the Bankruptcy Court is denied and the judgment of the Bankruptcy Court is affirmed, filed. Lambros, J. c/m 2/26/86 (2/27/86)
3/12/86	10	MOTION of appellant to amend or alter judgment of 2/25/86. Memorandum in support, filed. c/m 3/12 (20 p)
5/18/89	11	POST JUDGMENT ORDER denying mot cf appellant to amd or alter judg of 2/26/86. Lambros, J. issd 5/18/89 (4p) EOD 5/22/89 sp
7/17/89	12	NOTICE of appeal by pltf re: 2/25/86 & 5/18/89. c/m Edwards, Kopp, Greene, Simon & USCA. (1p) (EOD 7/17/89) cas

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3656

IN RE: NORDIC VILLAGE, INC.,
dba SWISS HAUS, DEBTOR

INTERNAL REVENUE SERVICE, PLAINTIFF-APPELLANT
ROBERT E. MARTIN, LAKE CO. TREASURER, PLAINTIFF

v.

NORDIC VILLAGE, INC.; DAVID O. SIMON, TRUSTEE,
DEFENDANTS-APPELLEES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/89	Bankruptcy Case Docketed. Notice filed by Appellant IRS. Transcript needed: n (ns)
7/24/89	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 9/5/89; appellee brief due 10/10/89; appendix due 11/3/89 [89-3656] (ns)
7/28/89	TRANSCRIPT ORDER FORM filed by Charles M. Greene for Appellant IRS: Transcript not needed. [89-3656] [149638-1] (cob)
7/31/89	APPEARANCE filed by Attorney William J. Kopp for Appellant IRS [89-3656] (vf)
8/3/89	APPEARANCE filed by Attorney Gary R. Allen for Appellant IRS [89-3656] Mr. Allen is lead counsel. (vf)

DATE	PROCEEDINGS
8/3/89	APPEARANCE filed by Attorney Murray S. Horwitz for Appellant IRS [89-3656] (vf)
8/3/89	PRE-ARGUMENT STATEMENT filed by Gary R. Allen for Appellant IRS [89-3656] (vf)
8/7/89	APPEARANCE filed by Attorney Michael D. Zaverton for Appellee David O. Simon. [89-3656] (bb)
8/30/89	Appellant MOTION filed to extend time to file brief. Motion filed by Gary R. Allen for Appellant IRS. Certificate of service date 8/29/89. [89-3656] (mdm)
8/31/89	RULING granting motion to extend briefing [155723-1] filed by Gary R. Allen [89-3656]. (mdm)
8/31/89	BRIEFING LETTER SENT resetting briefing schedule: appellant brief due now 9/19/89; appellee brief now due 10/19/89; appendix now due 11/9/89 [89-3656] (mdm)
9/19/89	BRIEF filed by Gary D. Gray for Appellant IRS. Copies: 10. Certificate of service date 9/18/89 [89-3656] (jws)
8/19/89	APPEARANCE filed by Attorney Gary Gray for Appellant IRS [89-3656] (vf)
9/21/89	FRAP Rule 11 Certificate from the District Court filed. [89-3656] 1 plea; (ns)
10/18/89	Appellee MOTION filed to extend time to file brief. Motion filed by Michael D. Zaverton for Appellee David O. Simon. Certificate of service date 10/17/89. [89-3656] (mmd)
10/19/89	RULING granting motion to extend briefing [175756-1] filed by Michael D. Zaverton [89-3656]. (mmd)
10/19/89	BRIEFING LETTER SENT resetting briefing schedule: appellee brief now due 11/2/89; appendix now due 11/23/89 [89-3656] (mmd)

DATE	PROCEEDINGS
11/2/89	BRIEF filed by Michael D. Zaverton for Appellee David O. Simon. Copies: 10. Certificate of service date 11/1/89 [89-3656] (jws)
11/13/89	Appellant MOTION filed to extend time to file reply brief. Motion filed by Gary R. Allen for Appellant IRS. Certificate of service date 11/9/89. [89-3656] (mmd)
11/15/89	RULING granting motion to extend time to file reply brief [186909-1] filed by Gary R. Allen [89-3656]. (mmd)
11/15/89	BRIEFING LETTER SENT resetting briefing schedule: reply brief now due 11/30/89; appendix now due 12/7/89 [89-3656] (mmd)
11/30/89	REPLY BRIEF filed by Gary R. Allen for Appellant IRS Copies: 10. Certificate of service date 11/29/89 [89-3656] (jws)
12/4/89	APPENDIX filed by Murray S. Horwitz for Appellant IRS. Copies: 5. Certificate of service date 12/1/89 [89-3656] (jws)
2/20/90	Oral argument date set for AM 5/3/90 in court room 403. Notice of argument sent to counsel. [89-3656] (paw)
5/3/90	CAUSE ARGUED by Gary D. Gray for Appellant IRS, Michael D. Zaverton for Appellee David O. Simon before Judges Kennedy, Wellford, Joiner. [89-3656] (paw)
10/4/90	OPINION filed: AFFIRMED [89-3656], decision for publication pursuant to local rule 24 [89-3656]. Cornelia G. Kennedy, dissenting, Harry W. Wellford, Circuit Judge, Charles W. Joiner, Authoring Judge. (tmb)
10/4/90	JUDGMENT: AFFIRMED [89-3656]. (tmb)

DATE	PROCEEDINGS
10/15/90	Appellant MOTION filed to extend time to file petition for rehearing en banc 11/17/89 . . Motion filed by Gary R. Allen for Appellant IRS. Certificate of service date 10/12/90. [89-3656] (mmd)
10/15/90	RULING granting motion to extend time to file petition for rehearing en banc [327391-1] filed by Gary R. Allen. Petition to be filed by 11/17/90 for IRS [89-3656] (LG/ bb per hearing panel, 10/15/90 by phone; counsel notified by mail) (bb)
10/15/90	APPEARANCE filed by Attorney John A. Dudeck for Appellant IRS [89-3656] (vf)
11/19/90	PETITION for en banc rehearing filed by Gary R. Allen for Appellant IRS. Certificate of service date 11/16/90. [89-3656] (mmd)
12/19/90	LETTER SENT by lg to notifying that party has an opportunity to respond to a petition for en banc rehearing [344163-1]; previously filed by Gary R. Allen. Response due by 1/2/91 for David O. Simon, for Michael D. Zaverton [89-3656] (10 page limit, 20 copies; no extensions). (bb)
12/27/90	RESPONSE to a petition for en banc rehearing [344163-]1; previously filed by Gary R. Allen. Response filed by M Sicherman for D. Simon, appellee. Certificate of service date 12/27/90. [89-3656] (bb)
12/27/90	APPEARANCE filed by Attorney Marvin A. Sicherman for Appellee David O. Simon [89-3656] (vf)
12/28/90	CERTIFIED RECORD filed. Volumes include 1 Pl. [89-3656] (ns)
1/23/91	ORDER filed denying petition for en banc rehearing [344163-1] filed by Gary R. Allen [89-3656]. Cornelia G. Kennedy, Circuit Judge, Harry W. Wellford, Senior Judge, Charles W. Joiner, District Judge. (tmb)

DATE	PROCEEDINGS
1/31/91	MANDATE ISSUED with no cost taxed [89-3656] (vf)
1/31/91	CERTIFIED RECORD filed to lower court at the end of appellate proceedings. Volumes include 1 Pl. [89-3656] (vf)
1/31/91	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [89-3656]. Volumes included: 1 Pl. (vf)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. B84-771-B

Bankruptcy Judge: ALICE M. BATCHELDER

Adversary No. B84-694

IN RE: NORDIC VILLAGE, INC., dba SWISS HAUS, DEBTOR

DAVID O. SIMON, TRUSTEE
1300 Ohio Savings Plaza
Cleveland, Ohio 44114
PLAINTIFF

vs

JOHN HOWARD
3040 Riverside Drive, Suite 122
Columbus, Ohio 43221

STATE OF OHIO, DEPARTMENT OF
TAXATION (SALES TAX)
30 East Broad Street, 22nd Floor
Columbus, Ohio 43215

TREASURER OF LAKE COUNTY
105 Main Street
Painesville, Ohio 44077

DEPARTMENT OF THE TREASURY
Internal Revenue Service
P.O. Box 99183
Cleveland, Ohio 44199
Attention: Special Procedures

Also Notify:

UNITED STATES ATTORNEY GENERAL
Star Building
Washington, D.C.

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF OHIO
1404 East Ninth Street, Suite 500
Cleveland, Ohio 44114
DEFENDANTS

COMPLAINT TO AVOID POST-PETITION TRANSFERS OF PROPERTY OF THE ESTATE

[Filed Dec. 7, 1984]

David O. Simon, Trustee, respectfully represents to the Court as follows:

1. Jurisdiction of the within proceedings is vested in this Court by virtue of the provisions of 28 U.S.C. § 157 as enacted and effective on July 10, 1984 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio, 28 U.S.C. § 1334, and such vestiges of the provisions of 28 U.S.C. §§ 1471 and 1473 that have not in fact been repealed by the passage of the Bankruptcy Amendments Act of 1984 in that the matters hereinafter alleged as the Complaint of Plaintiff are core proceedings relating among other things to recovery of post-petition transfers of property of the estate pursuant to 11 U.S.C. § 549.

2. Plaintiff is the duly-appointed Trustee in the within Chapter 11 Proceedings which were commenced by the filing of a Voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code on March 27, 1984.

3. On various dates subsequent to the commencement of the within proceedings, the Debtor transferred to the Defendants various sums of money, all as is more fully set forth in Exhibit "A" attached hereto, which transfers were transfers of property of the estate post-petition, in payment of pre-petition obligations owed by the Debtor to the Defendants.

4. That the transfers aforementioned were not authorized by any provision under Title 11 of the United States Code, or by the Court, and are avoidable by the Trustee pursuant to § 549(a) of the Bankruptcy Code.

5. That in addition, the property so transferred is property of the estate pursuant to § 541 of the Bankruptcy Code and subject to turnover pursuant to § 542 of the Bankruptcy Code.

WHEREFORE, your Trustee prays judgment in his favor that the transfers hereinbefore referred to, and more fully set forth in Exhibit "A" attached hereto, be avoided pursuant to § 549 of the Bankruptcy Code, and the Defendants be directed to turnover such property to the estate pursuant to § 542 of the Bankruptcy Code, and for such other and further relief as is just and equitable in the premises.

/s/ David O. Simon
DAVID O. SIMON
DETTELBACH &
SICHERMAN CO., L.P.A.
Attorneys for Trustee
1300 Ohio Savings Plaza
Cleveland, Ohio 44114
Phone: (216) 696-6000

EXHIBIT "A"

Check Date	Payee	Amount
7/9/84	John Howard	$5,000.00
7/9/84	State of Ohio	$4,401.25
7/8/84	Lake County Treasurer	$10,070.32
7/18/84	Internal Revenue Service	$20,000.00

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. B84-771-B

Adversary No. B84-694

JUDGE ALICE BATCHELDER

IN RE: NORDIC VILLAGE, INC., dba SWISS HAUS, DEBTOR

DAVID O. SIMON, TRUSTEE, PLAINTIFF

-v-

JOHN HOWARD, ET AL., DEFENDANTS

ANSWER

[Filed: 1-16-85]

The federal defendant, Department of Treasury, Internal Revenue Service, by its attorney, Patrick M. McLaughlin, United States Attorney for the Northern District of Ohio, responds to plaintiff's Complaint to Avoid Post-Petition Transfers of Property of the Estate as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted as to the defendant, Department of Treasury, Internal Revenue Service, since it is not a suable entity.

Second Defense

The defendant further states that it presently lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the Complaint.

WHEREFORE, the defendant, Department of Treasury, Internal Revenue Service, prays that this Court enter judgment dismissing plaintiff's complaint, and for such other and further relief as the Court deems appropriate.

PATRICK M. MCLAUGHLIN
United States Attorney

WILLIAM KOPP
Assistant United States
Attorney

/s/ Robin Greenhouse
ROBIN GREENHOUSE
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6010

SUPREME COURT OF THE UNITED STATES

No. 90-1629

UNITED STATES, PETITIONER

v.

NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE

ORDER ALLOWING CERTIORARI

Filed June 17, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

June 17, 1991

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 262203 40019

Supreme Court, U.S.
FILED
AUG 1 1991
OFFICE OF THE CLERK

No. 90-1629

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC.,
RICHARD A. BAUMGART, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

GARY D. GRAY
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code (11 U.S.C.) waives the sovereign immunity of the United States from an action seeking a monetary recovery in bankruptcy.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert E. Martin, Lake County Treasurer, was a defendant in the district court and the bankruptcy court. John Howard and the State of Ohio, Department of Taxation, were defendants in the bankruptcy court.*

* In the caption of our petition, we named David O. Simon as the trustee in the bankruptcy case of Nordic Village, Inc. We have since learned that Mr. Simon has been succeeded by Richard A. Baumgart, and we have changed the caption accordingly. See Br. in Opp. ii.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument:	
Section 106(c) does not authorize bankruptcy courts to order the United States to pay money to a bankruptcy trustee	6
I. The language of Section 106(c), properly construed, shows that Congress did not intend to authorize monetary relief against the United States	6
II. Legislative history is irrelevant in interpreting Section 106(c) and, in any event, confirms that Congress did not intend to authorize monetary relief against the United States	17
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985)	9
Business Guides v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991)	17
Dellmuth v. *Muth*, 491 U.S. 223 (1989)	17
Dolard, In re, 519 F.2d 282 (9th Cir. 1975)	22
Edelman v. *Jordan*, 415 U.S. 651 (1974)	15
Federal Housing Admin. v. *Burr*, 309 U.S. 242 (1940)	24
Grogan v. *Garner*, 111 S. Ct. 654 (1991)	15
Gwilliam, In re, 519 F.2d 407 (9th Cir. 1975)	22
Hoffman v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989)	*passim*
Immigration & Naturalization Serv. v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	11, 19

Cases—Continued: Page

Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990) 8, 17
Johnson v. *Home State Bank*, 111 S. Ct. 2150 (1991) 11
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 15
Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 8, 15
Montclair v. *Ramsdell*, 107 U.S. 147 (1883) 12
Minnesota v. *United States*, 305 U.S. 382 (1939) 6
Missouri v. *Jenkins*, 491 U.S. 274 (1989) 8
Nachman Corp. v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) 20
Nevear v. *Schweiker*, 674 F.2d 1201 (7th Cir. 1982) 14
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989) 9
Owen v. *Owen*, 111 S. Ct. 1833 (1991) 9
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 7
Small Business Admin. v. *Rinehart*, 887 F.2d 165 (8th Cir. 1989) 4-5
Stevens v. *Department of the Treasury*, 111 S. Ct. 1562 (1991) 6
Toibb v. *Radloff*, 111 S. Ct. 2197 (1991) 17
United States v. *King*, 395 U.S. 1 (1969) 8
United States v. *McPeck*, 910 F.2d 509 (8th Cir. 1990) 13
United States v. *Menasche*, 348 U.S. 528 (1955) 12
United States v. *Mitchell*, 463 U.S. 206 (1983) 6, 8
United States v. *Rojas-Contreras*, 474 U.S. 231 (1985) 17
United States v. *Sherwood*, 312 U.S. 584 (1941) 6
United States v. *Testan*, 424 U.S. 392 (1976) 6, 8
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) 6
United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983) 16
Young, Ex parte, 209 U.S. 123 (1908) 15

Constitution, statutes and rule:

U.S. Const.:
Art. I, § 8, cl. 4 (Bankruptcy Clause) 4
Amend. XI 4, 8, 12, 15, 17

Statutes and rule—Continued: Page

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 1:
11 U.S.C. 101(4)(A) 11
11 U.S.C. 101(27) 9
11 U.S.C. 106 ..... 2, 5, 7, 8, 11, 17, 18, 19
11 U.S.C. 106(a) 10, 11, 12, 13, 14, 20
11 U.S.C. 106(b) 10, 11, 12, 13, 14, 20
11 U.S.C. 106(c) ..... *passim*
11 U.S.C. 106(c)(1) 10, 12, 22
11 U.S.C. 106(c)(2) 10, 11, 12
Ch. 5:
11 U.S.C. 505(a) 15
11 U.S.C. 522(b) 9, 24
11 U.S.C. 522(f) 9, 24
11 U.S.C. 542(a) 16
11 U.S.C. 542(b) 14
11 U.S.C. 544-549 24
11 U.S.C. 544-550 24
11 U.S.C. 549 ..... 2, 24
11 U.S.C. 549(a) 3
11 U.S.C. 550 ..... 2, 24
11 U.S.C. 550(a) 3, 16
11 U.S.C. 550(b) 3, 5
Ch. 7 2
Ch. 11 14
11 U.S.C. 1101-1174 2
11 U.S.C. 1141(a) 15
11 U.S.C. 11(a)(2A) (1976) 22
Fed. R. Civ. P. 13(a) 13

Miscellaneous:

4 *Collier on Bankruptcy* (L. King, 15th ed. 1991) 23
124 Cong. Rec. (1978):
p. 32,391 21
p. 32,392 21
p. 32,394 ..... 21, 22, 23, 24
p. 32,400 23
p. 32,420 21

Miscellaneous—Continued: Page

p. 33,990 21
p. 33,993 ..... 22, 23, 24
p. 34,019 21
p. 34,145 21
H.R. 6, 95th Cong. 1st Sess. (1971) 19
H.R. 31, 94th Cong., 1st Sess. (1975) 19
H.R. 32, 94th Cong., 1st Sess. (1975) 19
H.R. 7330, 95th Cong., 1st Sess. (1977) 19
H.R. 8200, 95th Cong., 1st Sess. (1977) 20
H.R. 10792, 93d Cong., 1st Sess. (1973) 19
H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 2 (1973) 19
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 20, 23
Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 942 (1979) 21
S. 235, 94th Cong., 1st Sess. (1975) 19
S. 236, 94th Cong., 1st Sess. (1975) 19
S. 2266, 95th Cong., 2d Sess. (1978) 19, 20
S. 2565, 93d Cong., 1st Sess. 19
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 12-13, 20, 23

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1629

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC.,
RICHARD A. BAUMGART, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 915 F.2d 1049. The orders of the district court (Pet. App. 37a-45a) and the decision and orders of the bankruptcy court (Pet. App. 46a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on October 4, 1990. A petition for rehearing was denied on January 23, 1991. Pet.

App. 53a-54a. The petition for a writ of certiorari was filed on April 23, 1991, and granted on June 17, 1991. 111 S. Ct. 2823. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 106, 549, and 550 of the Bankruptcy Code (11 U.S.C.) are set forth in the petition appendix at 57a-60a.

STATEMENT

Respondent Nordic Village, Inc. is the debtor in bankruptcy proceedings pending in the United States Bankruptcy Court for the Northern District of Ohio, No. B84-771. In an adversary proceeding commenced by the trustee, the bankruptcy court entered a judgment for $20,000 against the Internal Revenue Service (IRS). The Sixth Circuit upheld the judgment, concluding that Section 106(c) of the Bankruptcy Code, 11 U.S.C. 106(c), waives the sovereign immunity of the United States from monetary relief.

1. In March 1984, Nordic Village filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174.[1] The IRS learned of the filing in June 1984 and later filed a proof of claim for overdue employment taxes, penalties, and interest totalling approximately $80,000. Meanwhile, in July 1984, Josef Lah, an officer and shareholder of Nordic Village, wrote a check for $26,000 on Nordic Village's corporate account, which he then used to obtain several cashier's checks, including one for $20,000 payable to the IRS. Lah delivered the $20,000 check to the IRS and told IRS to apply it against his personal tax liability. IRS credited Lah's account accordingly. Pet. App. 2a-3a.

[1] The case was later converted to a Chapter 7 proceeding. See Br. in Opp. ii.

2. In December 1984, the trustee appointed in Nordic Village's bankruptcy case commenced an adversary proceeding to recover the $20,000 paid to the IRS.[2] The bankruptcy court held that the payment was an unauthorized transfer that could be avoided under Section 549(a) and recovered under Section 550(a) of the Code. Pet. App. 48a-50a. In so holding, the court rejected the government's argument that, under Section 550(b) of the Code, IRS was protected from recovery as a subsequent transferee that had received the transfer in good faith and without knowledge of its voidability. Pet. App. 49a-50a. The court entered judgment against IRS for $20,000. *Id.* at 51a-52a.

3. The government appealed the bankruptcy court's judgment to the United States District Court for the Northern District of Ohio, renewing its argument that IRS was protected from recovery under Section 550(b) of the Code. The district court affirmed. Pet. App. 37a-44a.

4. On appeal, the Sixth Circuit affirmed the district court's decision. In upholding the money judgment against IRS, the court concluded, over Judge Kennedy's dissent, that Section 106(c) of the Bankruptcy Code authorizes monetary recovery from the federal government. Pet. App. 1a-36a.

a. The majority recognized that in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), this Court held that Section 106(c) does

[2] The trustee also sought to recover several other post-petition transfers. According to the trustee's complaint, Lah and his wife had drawn on the debtor's corporate account to pay not only their federal taxes but also their state and local taxes. J.A. 13-16; see also Pet. App. 47a.

not authorize monetary recovery from the States. The court below determined, however, that *Hoffman* did not control for three reasons. First, the court observed, no interpretation of Section 106(c) commanded majority support in *Hoffman*.[3] Second, the court believed that the question in *Hoffman* of Eleventh Amendment immunity entailed a "very different" analysis from the question of federal sovereign immunity in the present case. Pet. App. 4a, 12a. The question here, in the court's view, posed a "simple" issue of statutory construction altogether unlike the plain-statement analysis applicable under the Eleventh Amendment. *Id.* at 12a. Third, the court found that, because the *Hoffman* plurality's analysis of Section 106(c) did not discuss legislative history, the analysis in Justice Marshall's dissent contained "[t]he only clear parsing of the statute." Pet. App. 4a.[4]

[3] In *Hoffman*, Justice White, joined by the Chief Justice and Justices O'Connor and Kennedy, concluded that the language of Section 106(c) "is more indicative of declaratory and injunctive relief than of monetary recovery" (492 U.S. at 102); therefore, the provision did not satisfy the requirement that Congress express an intent to abrogate the Eleventh Amendment immunity of the States in "unmistakably clear" terms (*id.* at 101). Justice Scalia concurred in the judgment, on the ground that Congress lacked power under the Bankruptcy Clause to abrogate the States' Eleventh Amendment immunity. *Id.* at 105. Justice O'Connor joined Justice Scalia's opinion. *Ibid.* Four Justices dissented, finding that Congress did in Section 106(c) "clearly express[] its intent to authorize a bankruptcy court to issue a money judgment against a State." 492 U.S. at 106 (Marshall, J., dissenting, joined by Brennan, Blackmun, and Stevens, JJ.); see also *id.* at 111-114 (Stevens, J., dissenting, joined by Blackmun, J.).

[4] Having decided that it would not follow the plurality in *Hoffman*, the court of appeals likewise refused to follow *Small Business Admin.* v. *Rinehart*, 887 F.2d 165 (1989), in which the Eighth Circuit relied on the *Hoffman* plurality to hold that Section 106(c) does not authorize bankruptcy courts to grant monetary relief against the United States. Pet. App. 7a n.2.

The court of appeals then analyzed Section 106(c) along the lines of the dissenting opinions in *Hoffman*. The court determined that Section 106(c) waived the federal government's sovereign immunity from monetary judgments "in clear and explicit terms." Pet. App. 13a. The court found "nothing in the provision suggesting that it is limited to injunctive or declaratory relief." *Id.* at 6a-7a. The court reviewed the legislative history of Section 106 and concluded that it supported the court's reading of the text. *Id.* at 7a-10a.

The court acknowledged that under its reading Section 106(c) "w[ould] result in different meanings depending upon whether it is being applied to a state or federal governmental unit." Pet. App. 12a-13a. The court justified this disparity as "the inevitable result of applying two different methods of construction." *Id.* at 13a.[5]

b. Judge Kennedy dissented. Pet. App. 17a-36a. "[F]or essentially the same reasons relied upon by the plurality * * * in *Hoffman*," she concluded that, "when reading the language narrowly in favor of the government, as [courts] are required to do, * * * the language of subsection 106(c) only waives sovereign immunity for the purpose of allowing a bankruptcy court to issue declaratory and injunctive relief." Pet.

[5] The court of appeals also held that the trustee was not barred from recovery by Section 550(b) of the Code, because IRS should have known that the $20,000 transfer was voidable. Pet. App. 13a-16a. That issue is not before this Court.

App. 22a. Judge Kennedy also expressed doubt about relying on legislative history as an aid to interpretation in this context. *Id.* at 21a-22a & n.4. She nonetheless reviewed those portions of the legislative history on which the majority had relied, and determined that they did not "produce[] an outcome different from that reached by a plurality of the Supreme Court [in *Hoffman*]." *Id.* at 22a.

ARGUMENT

SECTION 106(c) DOES NOT AUTHORIZE BANKRUPTCY COURTS TO ORDER THE UNITED STATES TO PAY MONEY TO A BANKRUPTCY TRUSTEE

I. THE LANGUAGE OF SECTION 106(c), PROPERLY CONSTRUED, SHOWS THAT CONGRESS DID NOT INTEND TO AUTHORIZE MONETARY RELIEF AGAINST THE UNITED STATES

"It has long been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)).[6] The terms of that consent "must

[6] Because "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction," *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983), the court of appeals properly considered whether sovereign immunity barred the present action even though that question had not arisen in the bankruptcy court or the district court. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939); see also *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991) (issue decided by court of appeals was properly before the Supreme Court even if not raised below).

be construed strictly in favor of the sovereign and not enlarge[d] . . . beyond what the language requires." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (citations and internal quotation marks omitted).

Section 106 of the Bankruptcy Code waives the sovereign immunity of "governmental units" under certain defined circumstances.[7] In *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), a plurality of this Court concluded that the waiver in Section 106(c) did not extend to monetary claims against a State. In contrast, the majority below held that the same provision *did* extend to monetary claims against the United States. The majority sought to explain these "different meanings depending upon whether [Section 106] is being applied to a state or federal governmental unit" on the ground that the

[7] Section 106 provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> > (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
> >
> > (2) a determination by the court of an issue arising under such a provision binds governmental units.

Eleventh Amendment required a clear statement of congressional intent to abrogate *state* sovereign immunity, while abrogation of *federal* sovereign immunity presented "a simple case involving the construction of language enacted by Congress." Pet. App. 12a-13a. In other words, the same statutory language meant different things because different judical canons of construction were applied.

There is no such distinction in approaches to construing Section 106(c). Just as congressional intent to abrogate the immunity of the States must be "unmistakably clear in the language of the statute," *Hoffman*, 492 U.S. at 101, so too an intent to waive the immunity of the United States "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990). Accord *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. at 399; *United States* v. *King*, 395 U.S. 1, 4 (1969).[8]

Quite apart from the fact that the same exacting principles of statutory construction apply to waivers of state and federal immunity, Congress intended in Section 106 to treat the States and the United States the same. That intention is clear from Congress's use of a single term, "governmental unit," to refer to both

[8] Indeed, this Court has concluded that principles of statutory construction may bar certain types of relief against the federal government that are available against the States. Compare *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (interest on attorneys' fees cannot be recovered from the United States in Title VII action) with *Missouri* v. *Jenkins*, 491 U.S. 274, 281 n.3 (1989) (interest on attorneys' fees is available in a Title VII action against a State).

sovereigns.[9] See 11 U.S.C. 101(27). There are not separate rules for the States and the United States in the statute, yet that is precisely the result of the court of appeals' interpretation, which "create[s] a distinction that the words of the statute do not contain." *Owen* v. *Owen*, 111 S. Ct. 1833, 1838 (1991).[10] Rather than applying a "different analysis" (see Pet. App. 12a), the court should have followed the same analysis that this Court did in *Hoffman* and determined whether it was "unmistakably clear in the language of [Section 106(c)]" that Congress intended to subject the United States to money judgments. *Hoffman*, 492 U.S. at 101 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985)).

In *Hoffman*, a plurality of this Court construed Section 106(c) "as not authorizing monetary recovery from the States." 492 U.S. at 102. The Court was construing the same language that is at issue here. We urge the Court to adopt the analysis of the *Hoffman* plurality and conclude that Section 106(c)

[9] Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 10 (1989) (finding it "highly significant" that Congress used "virtually identical language" in separate provisions waiving state and federal immunity from actions under CERCLA).

[10] In *Owen*, this Court rejected an interpretation of Section 522(f) of the Code that would have treated State-created exemptions differently from federal exemptions (see 11 U.S.C. 522(b)). Section 522(f) permits a debtor to avoid the fixing of a lien on property if the lien would impair an exemption to which the debtor would have been entitled under Section 522(b) of the Code. The Court concluded that "[n]othing in the text of § 522(f) remotely justifies treating the two categories of exemptions differently." *Owen*, 111 S. Ct. at 1838. Similarly, nothing in the text of Section 106(c) justifies treating the States and the United States differently.

does not authorize monetary recovery from the United States, just as it does not authorize such recovery from the States.

As the plurality in *Hoffman* stated, Section 106(c) contains "limiting language" that is "more indicative of declaratory and injunctive relief than of monetary recovery." 492 U.S. at 102. The first subpart of Section 106(c) is broad. Section 106(c)(1) states that provisions of the Code that contain any of three trigger words—"creditor," "entity," or "governmental unit"—apply to governmental units. 11 U.S.C. 106(c)(1). The second subpart, joined to the first by the word "and," "operates as a further limitation on the applicability of § 106(c)." *Hoffman*, 492 U.S. at 102. Section 106(c)(2) provides that a "determination" by a bankruptcy court of an "issue" arising under one of the pertinent provisions "binds governmental units." 11 U.S.C. 106(c)(2). By limiting courts to making "determination[s]" of "issue[s]," Section 106(c)(2) "narrow[s] the type of relief" available against governmental units to preclude monetary relief. *Hoffman*, 492 U.S. at 102.[11]

The narrow language in Section 106(c) contrasts sharply with the broader language of Sections 106(a) and 106(b). See *Hoffman*, 492 U.S. at 102. While Section 106(c) authorizes a bankruptcy court

[11] Justice Marshall observed in his dissent in *Hoffman* that not all Code provisions containing a trigger word authorize monetary or affirmative injunctive relief, so that Section 106(c)(2) does not serve a limiting function with respect to some of the provisions triggered under Section 106(c)(1). 492 U.S. at 108-109. As Judge Kennedy noted below, however, "[i]t is not illogical for Congress to provide for such a limitation in subsection 106(c)(2) rather than in each individual section that contains a provision allowing for monetary recovery." Pet. App. 24a.

to make a "determination * * * of an issue," Sections 106(a) and 106(b) grant it authority with respect to a "claim" against a governmental unit. A "claim" is defined by the Code to include a "right to payment," 11 U.S.C. 101(4)(A). By using the term "claim" in Sections 106(a) and 106(b), Congress clearly contemplated that monetary relief would be available. Cf. *Johnson* v. *Home State Bank*, 111 S. Ct. 2150, 2154-2155 (1991) (Congress intended "claim" to have broad meaning). Congress's use of different, narrower language in Section 106(c) just as clearly indicates an intention to preclude such relief under that provision. See *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).[12]

The court of appeals found "nothing in [Section 106] suggesting that it is limited to injunctive or declaratory relief." Pet. App. 6a-7a. That is because the court ignored the limitations set forth in Section 106(c)(2). Under the court of appeals' approach—like that of the petitioner in *Hoffman*—Section 106(c) "would have exactly the same effect if subsection (c)(2) had been totally omitted." *Hoffman*, 492 U.S. at 103. The plurality in *Hoffman* properly rejected such an approach, observing that it contravenes

[12] Justice Stevens acknowledged in his dissent in *Hoffman* that construing Section 106(c) to authorize monetary relief causes the scope of that provision to overlap with the scope of Sections 106(a) and 106(b). 492 U.S. at 113. He cited the opening phrase of Section 106(c)—"[e]xcept as provided in subsections (a) and (b)"—as evidence that Congress acknowledged the redundancy. *Ibid.* In our view, however, the opening phrase expresses Congress's intent not to authorize monetary relief under Section 106 "[e]xcept as provided in subsections (a) and (b)." That reading is more consistent with the structure of Section 106 as a whole.

the duty of courts "to give effect, if possible, to every word and clause of a statute." *Ibid.* (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955), and *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)).[13]

The structure of Section 106 also shows that Congress did not intend to authorize monetary relief under Section 106(c). In the three subsections of Section 106, there is a relationship between the scope of the waiver and the nature of the relief against the sovereign that is authorized: the broader the relief authorized, the narrower the scope of the waiver. Section 106(a) authorizes the broadest relief—affirmative monetary recovery—and it is the narrowest in scope. Section 106(a) is not applicable here; it applies only when the government has filed a proof of claim against the estate and the estate has a compulsory counterclaim against the government.[14] See S.

[13] In his dissent in *Hoffman*, Justice Marshall argued that Section 106(c)(2) should be understood as the third of three steps that Congress took in Section 106(c) to "ensur[e] that the abrogation of [Eleventh Amendment] sovereign immunity was express," 492 U.S. at 107, the first two steps being inclusion of the phrase "notwithstanding any assertion of sovereign immunity" and of subpart (c)(1). In our view, subpart (c)(2) cannot be treated as merely a restatement of subpart (c)(1), but rather must be given independent effect. As the differing language of the two subparts indicates, subpart (c)(1) describes the subject matter of disputes that courts may entertain under Section 106(c), and subpart (c)(2) describes the relief that courts may grant in such disputes.

[14] Although the government filed a proof of claim against the estate, the relief sought here would not be authorized under Section 106(a), as the trustee conceded below. Respondent's C.A. Br. 12. Section 106(a) does not apply because the trustee's claim against the IRS did not "ar[i]se out of the same transaction or occurrence" (11 U.S.C. 106(a)) as the

Rep. No. 989, 95th Cong., 2d Sess. 29 (1978); cf. Fed. R. Civ. P. 13(a). Section 106(b) is broader in scope than Section 106(a), but is more restrictive in terms of relief. Section 106(b) is also not applicable here; like Section 106(a), it applies only when the government has filed a proof of claim.[15] Unlike Section 106(a), however, Section 106(b) allows the estate to assert any claim, not just compulsory counterclaims, against the government. But Section 106(b) does not authorize affirmative monetary recovery; it limits relief to an offset of an estate's claim against the claim of a governmental unit. *Hoffman*, 492 U.S. at 102.

Section 106(c) is broadest in scope, since its applicability does not depend on the government's filing a claim against the estate; instead, Section 106(c) applies when an issue arises under any of the "over 100 Code provisions" (*Hoffman*, 492 U.S. at 102) that contain the words "creditor," "entity," or "governmental unit." Given the comparative breadth of Section 106(c) in this respect, the structure of Section 106 strongly suggests that the relief available under Section 106(c) should be correspondingly narrow.

IRS's claim against the estate. The IRS's claim was based on employment taxes assessed against Nordic Village before it petitioned for bankruptcy. The trustee's claim was based on a defalcation by an officer of Nordic Village after the petition was filed.

[15] Section 106(b) does not apply because the trustee did not seek an offset. See 11 U.S.C. 106(b). As respondent emphasized below, "the Trustee has brought an action to recover money from the United States." Respondent's C.A. Br. 13. The order entered by the bankruptcy court thus "is not limited to the value of the IRS's claim against the estate." Pet. App. 20a (Kennedy, J., dissenting). Cf. *United States* v. *McPeck*, 910 F.2d 509 (8th Cir. 1990).

Indeed, the court of appeals' broad interpretation of Section 106(c) would render Sections 106(a) and 106(b) largely superfluous. The court of appeals' reading of Section 106(c) authorizes money judgments against the government for any claim based on a Code provision containing a trigger word. One such provision is Section 542(b), which authorizes trustees to bring contract actions and actions to recover other forms of indebtedness against any "entity." 11 U.S.C. 542(b). Such claims make up a significant portion of claims that a trustee would have against the sovereign. Under the court of appeals' approach, none of these claims would be subject to the carefully crafted limitations on recovery in Sections 106(a) and 106(b). Sections 106(a) and 106(b) establish a rule that limits the availability of monetary relief to cases in which the government has filed a proof of claim. The court of appeals' reading of Section 106(c) would swallow up that rule, allowing, for example, monetary relief on contract claims whether or not the governmental unit filed a proof of claim.

On the other hand, as the plurality recognized in *Hoffman*, construing Section 106(c) to authorize declaratory or injunctive-style relief does not deny all effect to that provision. So construed, Section 106(c) "waives the sovereign immunity of the Federal Government so that the Federal Government is bound by determinations of issues by the bankruptcy courts even when it did not appear and subject itself to the jurisdiction of such courts." *Hoffman*, 492 U.S. at 103.[16] Thus, under Section 106(c), the United States

[16] See also *Nevear* v. *Schweiker*, 674 F.2d 1201, 1203-1204 (7th Cir. 1982) (holding that under Section 106(c) a bankruptcy court could discharge a debt owed to the Social Security Administration), cited with approval in *Hoffman*, 492 U.S. at 102, 103.

"would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes." *Id.* at 102.[17] The discharge of debts owed to the federal government is often essential, for example, to businesses seeking to reorganize under Chapter 11. See 11 U.S.C. 1141(a) (terms of confirmed reorganization plan bind any "creditor," one of trigger words in Section 106(c)). The *Hoffman* plurality's interpretation of Section 106(c) therefore is faithful to the Bankruptcy Code's general policy of affording debtors a "fresh start." See *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991).[18]

[17] 11 U.S.C. 505(a) provides that a court "may determine the amount or legality of any tax." Because Section 505(a) contains a trigger word ("governmental unit"), a determination under that provision is binding on governmental units pursuant to Section 106(c).

[18] The plurality's interpretation also accords with the traditional understanding of sovereign immunity evinced in this Court's decisions and by Congress. Under the plurality's interpretation, States are subject to monetary recovery only when they consent to such recovery by filing a proof of claim. This restriction reflects the fact that freedom from monetary relief is at the heart of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 666-668 (1974). Cf. *Ex parte Young*, 209 U.S. 123 (1908). Similarly, Congress has been especially careful in waiving the federal government's sovereign immunity from monetary relief. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 315-316 (1986) (federal government was not required to pay interest on attorneys' fees in Title VII case because Congress had not made liability for interest "affirmatively and separately" explicit); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981) (Congress's reluctance to provide for jury trials when waiving sovereign immunity reflects concern that juries will return excessive money judgments).

The *Hoffman* plurality suggested that Section 106 (c) also authorizes certain forms of injunctive relief. See 492 U.S. at 102. That does not mean, however, that a trustee can ask for an injunction ordering the government to pay money. The trustee in *Hoffman* was barred from obtaining either an order requiring the "turnover" of funds (see 11 U.S.C. 542(a)) or an order requiring the return of an avoided transfer (see 11 U.S.C. 550(a)). 492 U.S. at 99, 102. In concluding that such relief was barred, the plurality made clear that Section 106(c) does not authorize *any* form of "monetary recovery" (492 U.S. at 102). The plurality's conclusion fully applies here, where the trustee, like the trustee in *Hoffman*, sought to recover an avoided transfer.[19]

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[19] In our view, Section 106(c) permits injunctive relief of the sort this Court upheld in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). In *Whiting Pools*, the IRS seized a company's tangible property—"equipment, vehicles, inventory, and office supplies" (*id.* at 200)—to satisfy the company's tax liabilities. As the Court's opinion emphasized, the business retained ownership of the property even after it came into the hands of the IRS. *Id.* at 200, 211. Under these circumstances, the Court held, a bankruptcy court could order the IRS to turn over the property pursuant to Section 542(a) of the Code. The order in *Whiting Pools* thus amounted to a binding determination that the IRS "[was] require[d] * * * to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." 462 U.S. at 212.

II. LEGISLATIVE HISTORY IS IRRELEVANT IN INTERPRETING SECTION 106(c) AND, IN ANY EVENT, CONFIRMS THAT CONGRESS DID NOT INTEND TO AUTHORIZE MONETARY RELIEF AGAINST THE UNITED STATES

The plurality in *Hoffman* declined to examine legislative history in deciding whether Section 106(c) abrogated the States' Eleventh Amendment immunity from monetary recovery. It observed that "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment" because, under *Atascadero*, Congress must make such an intention unmistakably clear on the face of the statute. *Hoffman*, 492 U.S. at 104 (quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989)). Thus, the plurality reasoned, "[i]f congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied." 492 U.S. at 104.

Legislative history is likewise irrelevant in determining whether Section 106(c) waives federal sovereign immunity from monetary recovery. In the federal context as in the state, abrogation of immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Administration*, 111 S. Ct. at 457. Resort to legislative history is appropriate only when congressional intent is *not* "unequivocally expressed" in the statute, see, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985), so legislative history will never be an appropriate source of a waiver of sovereign immunity.

Congress set forth in Section 106 rules applicable to "governmental units." Because Congress in writing the statute treated the States and the United States the same, courts should likewise accord them identical treatment when construing the statute. That means that the scope of federal sovereign immunity under Section 106 should be determined solely based on its text, just as the *Hoffman* plurality determined the scope of the States' immunity under the same provision solely based on the statutory text. It would be a curious jurisprudence that concluded that the same words in Section 106 meant one thing with respect to the States but another with respect to the United States, not because the legislative history suggested different treatment, but simply because legislative history could be resorted to in the latter case but not the former.

In any event, the legislative history confirms that Congress intended to treat the States and the United States—"governmental units"—the same under Section 106, and nothing in that history supports the view that monetary relief was authorized under Section 106(c). The States and the United States were treated the same in the waiver of sovereign immunity proposed to Congress in 1973 by the Commission on the Bankruptcy Laws of the United States.[20] They

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[20] The Commission's proposal provided:

> *Section 1-104. Applicability of Act to United States, States, and Subdivisions.* All provisions of this Act shall apply to the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 2, at 10 (1973). The Commission's proposal was included in bills introduced in the 94th Congress. S. 236, 94th Cong., 1st Sess. (1975); H.R. 31, 94th Cong., 1st Sess. (1975).

were also treated the same in every subsequent bill that Congress considered.[21]

Other than treating the States and the United States the same, Section 106 bears no resemblance to the waiver proposed by the Commission. The Commission's proposal placed the state and federal government on the same footing as any other creditor. See note 20, *supra*. It clearly would have authorized the money judgment entered against the IRS in this case. Congress did not, however, enact the broad language of the Commission's proposal. Instead, it enacted the much narrower language in Section 106(c) authorizing "a determination by the court of an issue" arising under certain Code provisions. The language that Congress enacted should not be interpreted to have the same effect as the language that Congress rejected. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Cardoza-Fonseca*, 480 U.S. at 442-

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[21] H.R. 6, 95th Cong., 1st Sess. § 106 (1977); H.R. 7330, 95th Cong., 1st Sess. § 106 (1977); S. 2266, 95th Cong., 1st Sess. § 106 (1977); H.R. 31, 94th Cong., 1st Sess. § 1-104 (1975); H.R. 32, 94th Cong., 1st Sess. § 1-104 (1975); S. 235, 94th Cong., 1st Sess. § 1-104 (1975); S. 236, 94th Cong., 1st Sess. § 1-104 (1975); H.R. 10792, 93d Cong., 1st Sess. § 1-104 (1973); S. 2565, 93d Cong., 1st Sess. § 1-104 (1973).

443 (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting)).

Notwithstanding this principle, Justice Stevens stated in his dissenting opinion in *Hoffman* that Section 106(c) "restored to a large extent the power of bankruptcy courts" granted in the Commission's proposal. 492 U.S. at 112. With all respect, the circumstances under which Congress enacted Section 106(c) fail to support the dissenters' view. As the dissent observed, Congress rejected the Commission's proposal "apparently because of concerns that Congress did not have the constitutional power to abrogate completely the State's sovereign immunity." *Ibid.* There is no evidence that Congress ever set aside these concerns. These concerns resulted in congressional narrowing of the abrogation of the States' immunity proposed by the Commission and—with the consistent decision to treat the States and the United States the same—a corresponding narrowing of the waiver of federal sovereign immunity.

As reported out of committee, the bills enacted as the Bankruptcy Reform Act of 1978 contained waiver provisions consisting of two subsections similar to Sections 106(a) and 106(b) as enacted. H.R. 8200, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 2d Sess. (1978). The reports accompanying the bills explained that while Congress can waive federal sovereign immunity completely, "Congress does not, however have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State." S. Rep. No. 989, *supra*, at 29; H.R. Rep. No. 595, 95th Cong., 1st Sess (1977). Congress was plainly expressing doubt that it could subject States to money judgments in the absence of a waiver by the State (such as the filing of a proof of claim).

Section 106(c) was added to the bills after they were reported out of committee. The addition occurred during an informal conference that did not result in a formal conference report.[22] Because of time constraints, both the House and Senate subsequently passed the bill with little debate.[23] In light of the concerns earlier expressed in the committee reports, it seems unlikely that Congress intended by its belated addition of Section 106(c) to restore the broad waiver previously rejected.

Moreover, congressional statements made when Section 106(c) was proposed confirm that Congress did not intend the provision to authorize monetary relief. In statements made on the floor in lieu of a conference report, the sponsors of the bankruptcy legislation explained that "Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir. 1975) and in re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such

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[22] 124 Cong. Rec. 32,392, 32,394 (1978) (statements of Rep. Edwards).

[23] Because the bill in which Section 106(c) first appeared did not go to a formal conference, it was considered on the floor of the House and passed under a unanimous consent procedure. See 124 Cong. Rec. 32,391, 32,420 (1978). The Senate subsequently considered the bill under an abbreviated time agreement. *Id.* at 33,989 (remarks of Sen. Byrd). The Senate passed the bill with a series of unprinted amendments, not relevant here, to which the House agreed, again pursuant to the unanimous consent procedure. *Id.* at 33,990-33,991, 34,019, 34,145. See generally Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 942, 954-956 (1979).

taxes are owed files a proof of claim." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini).[24] Determining the amount and dischargeability of tax liabilities does not involve monetary recovery from the United States.

The sponsors went on to explain that "subsection (c) is not limited to those issues, but permits the bankruptcy courts to bind governmental units on other matters as well." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini). The "other matters" to which the sponsors referred, in our view, meant issues that arose under Code provisions containing one of the trigger words in Section 106(c)(1). Thus, Section 106(c) authorized the bankruptcy courts to determine the amount and dischargeability of a wide variety of debts and obligations to the United States. Again, that does not involve monetary recovery from the United States.

Justice Stevens understood the "other matters" referred to in the floor statements to include claims for monetary relief. *Hoffman*, 492 U.S. at 113. He

[24] In *In re Gwilliam*, 519 F.2d 407 (1975), the Ninth Circuit held that "the Bankruptcy Court had jurisdiction under § 11(a)(2A) [of the old Bankruptcy Act] to determine the amount and legality of the federal taxes due and owing by the Bankrupt * * * and to determine the Bankrupt's liability and provable indebtedness therefor, under [the discharge provisions of Title 11], notwithstanding the lack or absence of a prior claim * * * by IRS." 519 F.2d at 410. Section 2(a)(2A) of the former Act provided that bankruptcy courts could determine "any question arising as to the amount or legality of any unpaid tax." 11 U.S.C. 11(a)(2A) (1976). *Dolard* extended the holding of *Gwilliam* to taxes accruing during administration of the bankruptcy estate. *In re Dolard*, 519 F.2d 282, 286 (9th Cir. 1975).

observed that, in concluding their explanation of Section 106(c), the sponsors stated that "section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit." 492 U.S. at 112-113 (quoting 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini)). The sponsors later stated that, under section 106(c), "the Government is subject to avoidance of preferential transfers." *Hoffman*, 492 U.S. at 113 (quoting 124 Cong. Rec. 32,400 (1978) (statement of Rep. Edwards); *id.* at 34,000 (statement of Sen. Deconcini)). Justice Stevens found "no suggestion" that the authority to avoid preferential transfers "did not include the power to order return of real property and the payment of money damages or that the issues that the bankruptcy court could determine under § 106(c) were limited to whether prospective or declaratory relief was appropriate." *Hoffman*, 492 U.S. at 113.

The Bankruptcy Code itself, in our view, defeats the suggestion that *avoidance* of a transfer is the same as *recovery* of the transfer. A major reform effected by the Code was to "enunciate[] the separation between the concepts of avoiding a transfer and recovering from the transferee." H.R. Rep. No. 595, *supra*, at 375; S. Rep. No. 989, *supra*, at 90. In distinguishing between avoiding a transfer and recovering it, Congress recognized that the two concepts are logically distinct. See 4 *Collier on Bankruptcy* ¶ 550.01, at 550-2 to 550-3 (L. King 15th ed. 1991) ("The particular theory under which a transfer has been avoided is, for all intents and purposes, irrelevant to the liability of the transferee against whom the trustee claims recovery of the property.").

Cf. *Federal Housing Admin.* v. *Burr*, 309 U.S. 242, 250-251 (1940). Accordingly, Congress prescribed the circumstances under which transfers could be avoided and those under which avoided transfers could be recovered in separate sections of the Code. The avoidance provisions are Sections 544 through 549; the recovery provision is Section 550. 11 U.S.C. 544-550; see also 11 U.S.C. 522(f) (authorizing debtor to avoid certain liens that would impair debtor's ability to exempt property from the estate under 11 U.S.C. 522(b)).

Because Congress treated avoidance and recovery as distinct concepts, we do not believe that the references to the trustee's "avoiding powers" (124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini)) express an intent to authorize monetary *recovery* under Section 106(c). Instead, by these references the legislators meant what they said: that a court can determine whether a transfer to a governmental unit may be *avoided*. Thus, the bankruptcy court in this case had the power to declare that the $20,000 transfer to IRS was voidable as an unauthorized post-petition transfer. See 11 U.S.C. 549. The court did not, however, have authority to grant a recovery in that amount from the federal government.

A bankruptcy court's authority to avoid a transfer to a governmental unit can provide a meaningful remedy in the absence of recovery from the government. In this case, for example, the trustee could have sought recovery from Josef Lah. If the trustee had done so, a prerequisite for recovery would be a determination that the transfer to the IRS was voidable. Section 106(c) empowers the court to make such determinations. It does not empower a court to order recovery of money from the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 90-1629

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

NORDIC VILLAGE, INC., RICHARD A. BAUMGART,
Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief For Respondent

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	iii
TABLE OF AUTHORITIES	iv
SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. SOVEREIGN IMMUNITY DOES NOT BAR A BANKRUPTCY COURT ORDER TO COMPEL THE UNITED STATES TO RETURN PROPERTY OF THE ESTATE DELIVERED TO THE UNITED STATES AFTER THE COMMENCEMENT OF THE BANKRUPTCY CASE WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR ANY PROVISION OF THE BANKRUPTCY CODE BECAUSE THE PROPERTY IS WITHIN THE EXCLUSIVE IN REM JURISDICTION OF THE BANKRUPTCY COURT	4
II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §106(c) OF THE BANKRUPTCY CODE CONSTITUTES A BROAD WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES IN BANKRUPTCY CASES AND THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE THE BANKRUPTCY COURT TO ISSUE AN ORDER COMPELLING THE UNITED STATES TO RETURN TO THE TRUSTEE PROPERTY OF THE ESTATE TRANSFERRED TO THE UNITED STATES POST-PETITION AND WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR BY ANY PROVISION OF THE BANKRUPTCY CODE	16

Page

A. Congressional Waivers Of Federal Sovereign Immunity Are To Be Liberally Construed... 20

B. The Plain Language Of Section 106(c) Expressly Waives Federal Sovereign Immunity Under Each Bankruptcy Code Provision Containing Any Of The Three Trigger Words 22

C. Sections 106(c) And 550(a) Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The United States 27

D. The Legislative History Of §106 Indicates That Congress Intended To Waive The Sovereign Immunity Of The United States To Actions For Monetary Recovery Under A Handful Of Provisions Of The Bankruptcy Code Containing The Trigger Words Specified In §106(c) 32

E. The Interpretation Of §106(c) Adopted By The Court Of Appeals Is Consistent With And Advances The System Of Equitable Distribution Of Estate Assets To The Debtor's Creditors Which Is A Central Policy Of The Bankruptcy Code 43

CONCLUSION 47

QUESTION PRESENTED

Whether a bankruptcy court can order an agency of the federal government to return to the Trustee property of the bankruptcy estate which was transferred post-petition and without authorization by the bankruptcy court or by any provision of the Bankruptcy Code?

TABLE OF AUTHORITIES

Cases:

Page

Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 32 S. Ct. 96 (1911) 8, 45

Anderson v. Hayes Construction Co., 243 N.Y. 140, 153 N.E. 28 (1926) 43

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 18

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 18, 20

Bank v. Sherman, 101 U.S. 403 (1879) 7

Begier v. Internal Revenue Service, 110 S. Ct. 2258 (1990) 45

In re Bell & Beckwith, 838 F.2d 844 (6th Cir. 1988) 15

Block v. Neal, 406 U.S. 289 (1983) 6, 20, 42

Blum v. Stenson, 465 U.S. 886 (1984) 21, 32

Bull v. United States, 295 U.S. 247 (1935) 15

Burns v. Alcala, 420 U.S. 575 (1975) 30

Cline v. Kaplan, 323 U.S. 97 (1944) 9

Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 22

Cook v. Tullis, 85 U.S. 332 (1873) 15

In re Dolard, 519 F.2d 282 (9th Cir. 1975) .. 35, 41, 42

Everett v. Judson, 228 U.S. 474 (1913) 7

Federal Land Bank v. Priddy, 295 U.S. 229 (1935) 6

FHA v. Burr, 309 U.S. 242 (1940) 6, 18, 20, 21

Flora v. United States, 357 U.S. 63 (1958), *aff'd after reh'g*, 362 U.S. 145, *reh'g denied*, 362 U.S. 972 (1960) 32

Franchise Tax Board of California v. United States Postal Service, 467 U.S. 517 (1984) 6, 20, 21, 32

Page

Gingold v. United States, 80 B.R. 555 (Bankr. N.D. Ga. 1987) 23

Goggin v. Division of Labor Law Enforcement, 336 U.S. 118 (1949) 7

Gower v. Farmers Home Administration, 20 B.R. 519 (Bankr. N.D. Ga. 1982) 23

In re Greenstreet, Inc., 209 F.2d 660, (7th Cir. 1954) 10

In re Gwilliam, 519 F.2d, 507 (9th Cir. 1975) 35, 41, 42

Harrison v. Chamberlain, 271 U.S. 191 (1926) 9

Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) ... 17, 18, 19, 20, 24, 25, 26, 31

Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 737, (1931) 8

In re Iverson, 108 B.R. 272 (Bankr. D. Or. 1989) .. 19

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939) 6, 21, 42, 43

Kelly v. Robinson, 479 U.S. 36 43 (1986) 22

In Re Lawson Burich Association, Inc., 59 B.R. 681 (Bankr. S.D. N.Y. 1986) 20

In re Louisiana Ship Management, Inc., 761 F.2d 1025 (5th Cir. 1985) 12

In re Madden, 388 F. Supp 47 (D. Idaho 1975) 10

In re Maislan Industries, U.S., Inc., 69 B.R. 771 (E.D. Mich. 1986) 12

May v. Henderson, 268 U.S. 111 (1925) 9

In re Modern Boats, Inc., 775 F.2d 619 (5th Cir. 1985) 13

Mueller v. Nugent, 184 U.S. 1 (1901) 7

National City Bank of N.Y. v. Republic of China, 348 U.S. 356 (1955) 15

	Page
Neavear v. Schweiker, 674 F.2d 1201 (7th Cir. 1982)	23
Neil v. Biggers, 409 U.S. 188 (1972)	18
In re 995 Fifth Ave. Associates, L.P., 116 B.R. 384 (Bankr. S.D. N.Y. 1990)	20
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)	30
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	10
Oliver v. Piatt, 44 U.S. 333 (1845)	15
In re P & Z Island Farms, Inc., 478 F. Supp. 529 (1979)	9
In re Pacific Far East Lines, Inc., 889 F.2d 242 (9th Cir. 1989)	9
In re Pearson, 917 F.2d 1215 (9th Cir. 1990), petition for cert. pending, No. 90-1208	18
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984)	20
Piccone v. U.S., 186 Ct.Cl. 752, 407 F.2d 866 (1969)	30
In re Pittsburgh Railways, 253 F.2d 654 (3d Cir. 1958)	9, 10
In re Price, 103 B.R. 989 (Bankr. N.D. Ill. 1989), aff'd *In re Price* — B.R. — (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796)	19
R & L Refunds v. United States, 45 B.R. 733 (Bankr. W.D. Ky. 1985)	23
Matter of Reiber's Inn of Westchester, Inc., 1 B.R. 304 (Bankr. S.D.N.Y.), aff'd *In re Reiber's Inn of Westchester, Inc.*, 3 B.R. 706 (S.D.N.Y. 1980)	10
Remke, Inc. v. United States, 5 B.R. 299 (Bankr. E.D. Mich. 1980)	23
Matter of Retail Stores Delivery Corp., 5 F. Supp. 892 (S.D.N.Y. 1933)	9

	Page
In re Simmons, 110 B.R. 72 (Bankr. M.D. Fla. 1990)	19
Taubel-Scott-Kitzmiller Company, Inc. v. Fox, 264 U.S. 426 (1924)	8, 9
Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940)	8, 9
TWA, Inc. v. Hardison, 432 U.S. 63 (1977)	18
United States v. Aetna Surety Co., 338 U.S. 366 (1949)	6, 20
United States v. King, 395 U.S. 1 (1969)	5
United States v. Mitchell, 445 U.S. 535 (1980)	5, 6
United States v. Shaw, 309 U.S. 495 (1940)	21
United States v. Sherwood, 312 U.S. 584 (1941)	5
United States v. State Bank, 96 U.S. 30 (1877)	15
United States v. Testan, 424 U.S. 392 (1976)	5, 6
United States v. Whiting Pools, Inc., 462 U.S. 198 (1983)	11, 12, 19, 23, 24, 36, 43, 44, 45
United States v. Yellow Cab Co., 543 U.S. 554 (1951)	6, 20, 42, 43
White v. Schloerb, 178 U.S. 542 (1900)	9
Whitney v. Wenman, 198 U.S. 539 (1904)	8
Constitution, statutes and rules:	
U.S. Constitution:	
Amend. XI	18, 19, 20, 41
Bankruptcy Code of 1898:	
11 U.S.C. §11(a)(7) (repealed)	6
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984)	11
Bankruptcy Code	
11 U.S.C. §101(14)	45
11 U.S.C. §101(26)	16

	Page
11 U.S.C. §102(6)	7
11 U.S.C. §106	3, 16, 17, 19, 22, 23, 30, 32, 33, 38, 40
11 U.S.C. §106(a)	22, 33, 35, 38, 40
11 U.S.C. §106(b)	22, 33, 35, 38, 40
11 U.S.C. §106(c)	2, 3, 16, 18, 19, 22, 23, 24, 25, 26, 27, 30, 31, 32, 35, 36, 40, 41, 42, 43, 47
11 U.S.C. §106(c)(1)	2, 22, 23, 29, 30
11 U.S.C. §106(c)(2)	17, 23, 30, 31, 40
11 U.S.C. §301	7, 11
11 U.S.C. §302	11
11 U.S.C. §303	11
11 U.S.C. §303(b)(1)	25
11 U.S.C. §303(c)	25
11 U.S.C. §303(f)	29
11 U.S.C. §303(h)	7
11 U.S.C. §303(j)	25
11 U.S.C. §341(a)	25
11 U.S.C. §343	25
11 U.S.C. §349(b)(3)	25
11 U.S.C. §361	25
11 U.S.C. §363	44
11 U.S.C. §363(c)(2)(A)	25
11 U.S.C. §363(e)	24
11 U.S.C. §365	26
11 U.S.C. §501	25, 33
11 U.S.C. §501(c)	34
11 U.S.C. §502	25
11 U.S.C. §502(j)	13
11 U.S.C. §505	26, 42
11 U.S.C. §506(a)	25
11 U.S.C. §507	25
11 U.S.C. §507(a)(7)	24
11 U.S.C. §525	26
11 U.S.C. §523(a)(1)	24
11 U.S.C. §541	11

	Page
11 U.S.C. §541(a)	12, 44
11 U.S.C. §541(a)(1)	44
11 U.S.C. §541(a)(3)	12, 46
11 U.S.C. §541(a)(7)	11
11 U.S.C. §541(b)	11
11 U.S.C. §541(b)(3)	38
11 U.S.C. §541(c)(2)	11
11 U.S.C. §542(a)	12, 26, 28, 43, 44, 45
11 U.S.C. §542(b)	26
11 U.S.C. §542(c)	29
11 U.S.C. §543	44
11 U.S.C. §544	28, 44
11 U.S.C. §545	28, 44
11 U.S.C. §547	3, 26, 28, 36, 37, 39, 42, 44
11 U.S.C. §547(a)(4)	39
11 U.S.C. §547(b)	37
11 U.S.C. §547(b)(2)	36, 37, 38, 39
11 U.S.C. §547(c)	37, 38, 39
11 U.S.C. §548	28, 45
11 U.S.C. §549	2, 13, 16, 26, 27, 28, 29, 44, 46
11 U.S.C. §549(a)	28, 46
11 U.S.C. §549(a)(1)	29
11 U.S.C. §549(a)(2)	29
11 U.S.C. §549(b)	29
11 U.S.C. §549(c)	29
11 U.S.C. §549(d)	3, 29, 31
11 U.S.C. §550	2, 3, 16, 27, 28, 42, 46
11 U.S.C. §550(a)	3, 27, 28, 29, 31, 32, 46
11 U.S.C. §550(a)(1)	28
11 U.S.C. §550(a)(2)	28
11 U.S.C. §551	46
11 U.S.C. §553	25
11 U.S.C. §553(b)	28
11 U.S.C. §702(a)	25
11 U.S.C. §705	25

	Page
11 U.S.C. §724(a)	28
11 U.S.C. §726	14, 25, 45, 46
11 U.S.C. §727(c)	25
11 U.S.C. §1102	25
11 U.S.C. §1107	27
11 U.S.C. §1108	27
11 U.S.C. §1109(b)	25
11 U.S.C. §1121(c)	25
11 U.S.C. §1141	26
11 U.S.C. §1142	26
11 U.S.C. §1143	26
26 U.S.C. §7501(a)	37
28 U.S.C. §1334	4, 10, 11
28 U.S.C. §1334(a)	5
28 U.S.C. §1334(d)	5, 10, 11, 12, 14, 15
28 U.S.C. §1471 (current version at 28 U.S.C. §1334) (1984)	11
28 U.S.C. §1471(c) (repealed)	10
28 U.S.C. §1471(e) (current version at 28 U.S.C. §1334(d)	10
Session Law	
Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §144(e), 99th Cong., 2d Sess., 100 Stat. 3088 (1986)	5
Miscellaneous:	
BLACK'S LAW DICTIONARY 405 (5th Ed. 1979)	30
BLACK'S LAW DICTIONARY 745 (5th Ed. 1979)	30
King, 1 Collier on Bankruptcy, ¶3.01[vii], at 3-32 (15th Ed. 1989)	11
King, 4 Collier on Bankruptcy, ¶549-02 (15th Ed. 1989)	29
King, 13 Collier on Bankruptcy, (14th Ed. 1978)	6
124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards)	25, 31, 35, 36, 41, 42

	Page
124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini)	25, 31, 35, 36, 41, 42
124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards)	36, 40
124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini)	36, 40
H.R. 31, 94th Cong., 1st Sess. (1975)	33
H.R. 8200, 95th Cong., 1st Sess. (1977)	33, 36, 38, 42
H.R. Doc. No. 137, 93rd Cong., 1st Sess, Pt. 2 (1973)	33
H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977)	23
H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977)	34
H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977)	38, 41
H.R. Rep. No. 595, 95th Cong., 1st Sess. 445(1977)	10
S. 236, 94th Cong., 1st Sess. (1975)	33
S. 2266, 95th Cong., 2d Sess. (1978)	33, 38, 39, 40
S. Rep. No. 989, 95th Cong., 2nd Sess. 21 (1978)	23
S. Rep. No. 989, 95th Cong., 2nd Sess. 29 (1978)	34, 41
S. Rep. No. 989, 96th Cong., 2nd Sess. 88 (1978)	39
RESTATEMENT OF RESTITUTION ¶168 (1937)	15

SUMMARY OF THE ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT BAR A BANKRUPTCY COURT ORDER TO COMPEL THE UNITED STATES TO RETURN PROPERTY OF THE ESTATE DELIVERED TO THE UNITED STATES AFTER THE COMMENCEMENT OF THE BANKRUPTCY CASE WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR ANY PROVISION OF THE BANKRUPTCY CODE BECAUSE THE PROPERTY IS WITHIN THE EXCLUSIVE IN REM JURISDICTION OF THE BANKRUPTCY COURT.

Claims or assertions of sovereign immunity do not deprive the bankruptcy court of its exclusive *in rem* jurisdiction with respect to property of the estate that was in the custody of the bankruptcy court. Congress has provided that the district court, of which the bankruptcy court is a unit, has exclusive jurisdiction over property of the estate, which jurisdiction begins as of the commencement of the bankruptcy case and lasts as long as the case is still pending.

Under the Bankruptcy Code, as under prior bankruptcy law, sovereign immunity of the United States does not prevent a bankruptcy court from compelling the return of property which was removed from its custody in derogation of bankruptcy law. Sovereign immunity protects property which belongs to the government independent of the bankruptcy process, but where the property has been transferred to the government from the bankruptcy estate the bankruptcy court retains jurisdiction over the property and has the power to order its return where appropriate.

Where, as here, there is no dispute over the fact that the transfer at issue involved property of the bank-

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ruptcy estate, which occurred after the commencement of the case, and was not authorized by the bankruptcy court or the Bankruptcy Code, there can be no question that the property remains within the *in rem* jurisdiction of the bankruptcy court and that the court may compel the United States to return the property to the trustee. Any result to the contrary would violate Congress' grant to the bankruptcy court of exclusive jurisdiction over property of the estate, the Bankruptcy Code provisions governing collection, liquidation and distribution of property of the estate, as well as one of the central policies of bankruptcy law, equality of distribution among creditors.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §106(c) OF THE BANKRUPTCY CODE CONSTITUTES A BROAD WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES IN BANKRUPTCY CASES AND THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE THE BANKRUPTCY COURT TO ISSUE AN ORDER COMPELLING THE UNITED STATES TO RETURN TO THE TRUSTEE PROPERTY OF THE ESTATE TRANSFERRED TO THE UNITED STATES POST-PETITION AND WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR BY ANY PROVISION OF THE BANKRUPTCY CODE.

Section 106(c) is a straight-forward and specific Congressional waiver of federal sovereign immunity. Congress indicated its intent to waive the sovereign immunity of the United States in the statute when it provided, in §106(c)(1) of the Bankruptcy Code, that any provision of the Bankruptcy Code which contains "creditor," "entity" or "governmental unit" applies to

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the United States. The scope of this waiver of sovereign immunity can only be determined by reference to the Bankruptcy Code provisions containing these trigger words. Section 550 contains one of the trigger words and is, therefore, applicable to the United States. The statutory language of §550(a) specifically provides that a bankruptcy court may order the recipient of an avoided transfer to pay the value of the property transferred to the trustee. Section 549 of the Bankruptcy Code grants the trustee the authority to avoid all post-petition transfers of property of the estate that were not authorized by the bankruptcy court or made accordance with any provision of the Bankruptcy Code. Transfers avoided under §549 may be recovered under §550(a) of the Bankruptcy Code. Therefore, §§106 and 550 authorize suits by a trustee to recover from the United States, a transfer of the type involved here, an unauthorized post-petition transfer of property of the bankruptcy estate, notwithstanding any assertion of sovereign immunity.

The legislative history of §106(c) and of §547 provides further evidence of Congressional intent to waive the sovereign immunity of the United States to permit a trustee in bankruptcy to avoid and recover unauthorized transfers of property of the estate.

Finally, the interpretation of §106(c) adopted by the Court of Appeals is consistent with Congressional intent that the United States be treated as any other creditor, with Congressional policy relative to the scope of the bankruptcy estate, and with Congressional concerns relative to equitable distribution of estate assets among creditors.

ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT BAR A BANKRUPTCY COURT ORDER TO COMPEL THE UNITED STATES TO RETURN PROPERTY OF THE ESTATE DELIVERED TO THE UNITED STATES AFTER THE COMMENCEMENT OF THE BANKRUPTCY CASE WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR ANY PROVISION OF THE BANKRUPTCY CODE BECAUSE THE PROPERTY IS WITHIN THE EXCLUSIVE IN REM JURISDICTION OF THE BANKRUPTCY COURT.

This case presents a narrow issue of law: whether a bankruptcy court can order the Internal Revenue Service, an agency of the United States, to return to the trustee in bankruptcy property of the bankruptcy estate which was transferred or delivered to the United States post-petition; and which transfer or delivery was without authorization by the bankruptcy court and not made under the authority of any provision of the Bankruptcy Code. This case does not involve a claim to funds payable out of the public treasury. The trustee's action seeks the return to the custody of the bankruptcy court of property of the bankruptcy estate, namely the sum of $20,000.00, which was improperly transferred to the United States in derogation of bankruptcy law.

Claims or assertions of sovereign immunity cannot and do not deprive the bankruptcy court of its exclusive *in rem* jurisdiction with respect to property of the estate that was in the custody of the bankruptcy court.

The statutory provision defining jurisdiction over bankruptcy cases and proceedings, 28 U.S.C. §1334, provides, in pertinent part, that "the district courts shall have original and exclusive jurisdiction of all cases

under title 11." 28 U.S.C. §1334(a). The statute further provides that:

> The district court in which a case under title 11 is commenced or is pending *shall have exclusive jurisdiction* of all of the property, wherever located of the debtor as of the commencement of such case, and *of property of the estate*. [Emphasis added].

28 U.S.C. §1334(d).[1] The statutory language makes it crystal clear that a bankruptcy court has exclusive jurisdiction over property of the estate, which jurisdiction begins as of the commencement of the bankruptcy case, and lasts as long as the case is still pending.[2]

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[1]This provision as originally enacted provided that:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

Subsequently, in 1986, to address a concern that as originally drafted the word "property" did not modify the term "and of the estate", the statute was amended by §144(e) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Pub. L. No. 99-554), which statute inserted the words "and of property of the estate" in lieu of "and of the estate" at the end of subsection (d). No substantive change seems to have been intended or effected by this amendment.

[2]Petitioner has not challenged this statutory provision granting exclusive jurisdiction over property of the debtor and property of the estate to the district court. However, Petitioner relies extensively on cases interpreting such jurisdictional statutes for the proposition that the sovereign's consent to be sued must be strictly construed. Specifically, Petitioner relies on *United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Testan*, 424 U.S. 392 (1976); *United States v. King*, 395 U.S. 1 (1969); and *United States v. Sherwood*, 312 U.S. 584 (1941). These cases all dealt with a narrow legal issue, the jurisdiction of the Court of Claims, and all involved interpretation of jurisdictional statutes such as the Tucker Act, the General Allotment Act, and the Declaratory Judgment Act. Such

Under the prior bankruptcy law, the Bankruptcy Act of 1898 (the "Act"), bankruptcy court jurisdiction was defined by notions of possession of property or by consent given by an adverse party under Section 2(a)(7) and former Rule 915.[3] Bankruptcy court juris-

statutes do not create any substantive rights enforceable against the United States, they merely confer jurisdiction upon specified federal courts whenever the substantive right exists. *U.S. v. Mitchell*, 445 U.S. at 538; *U.S. v. Testan*, 424 U.S. at 398. Thus, in interpreting such jurisdictional statutes in light of the special history of the Court of claims, it has been said "that a waiver of sovereign immunity 'cannot be implied, but must be unequivocally expressed.'" *U.S. v. Testan*, 424 U.S. at 399. Claimants must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims. *U.S. v. Mitchell*, 445 U.S. at 538. In examining statutes which create such substantive rights, this Court has repeatedly held that waivers by Congress of federal governmental immunity are to be liberally construed. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984); *Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Yellow Cab Co.*, 543 U.S. 554-55 (1951); *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *FHA v. Burr*, 309 U.S. 242, 245 (1940); *Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939); *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935).

[3]Under §2(a)(7) of the Act the bankruptcy court was granted "such jurisdiction at law and in equity as will enable [it] to exercise original jurisdiction in proceedings . . . to:

> Cause the estates of bankrupts to be collected and reduced to money, and distributed, and determine controversies in relation thereto . . . ; and where in a controversy arising under [the] Act an adverse party does not interpose an objection to the summary jurisdiction of the court of bankruptcy . . . he shall be deemed to have consented to such jurisdiction.

11 U.S.C. §11(a)(7) (repealed). Former Bankruptcy Rule 915 provided that "[A] party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served." 13 COLLIER ON BANKRUPTCY (14th ed. 1978).

diction was essentially *in rem*. Under the Act, the filing of the petition was seen as a *caveat* to all of the world, and had the effect of an attachment and injunction. *Mueller v. Nugent*,184 U.S. 1, 14 (1901); *Bank v. Sherman*, 101 U.S. 403, 406, (1879). The filing of the petition fixed a line of cleavage with reference to the condition of the bankruptcy estate, with title to the property which the bankrupt owned at the time of the filing of the petition vesting in the trustee at the time of the adjudication of bankruptcy.[4] *Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125-26 (1949); *Everett v. Judson*, 228 U.S. 474, 479 (1913).

Once the petition was filed, the property in the actual or constructive possession of the bankrupt was placed in the custody of the bankruptcy court until distribution among creditors for, as this Court stated:

> It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of Bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among creditors.
>
> The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. . . . [Thus] [p]rovision is made for the prompt taking possession of the bankrupt's prop-

[4]Under the Bankruptcy Code of 1978, there is no longer an adjudication of bankruptcy, but the entry of an Order for Relief which has the same effect. 11 U.S.C. §102(6), §301, §303(h).

> erty before adjudication if necessary. Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the Act.

Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 307-08, 32 S. Ct. 96 (1911)

Under the Act, bankruptcy courts were granted summary jurisdiction to adjudicate controversies relating to the property over which they had actual or constructive possession. The test of this jurisdiction was not in the title to the property, but in the possession of the property by the bankrupt at the time of the filing of the petition in bankruptcy. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 480-81 (1940). Where the property was in the possession of the trustee and wrongfully withdrawn from his custody, the bankruptcy court retained jurisdiction over the property. *Taubel-Scott-Kitzmiller Company, Inc. v. Fox*, 264 U.S. 426, 432-33 (1924). Neither would the jurisdiction of the bankruptcy court be lost by the unauthorized surrender of the property by officers of the Court. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 737, 739 (1931); *Whitney v. Wenman*, 198 U.S. 539, 553 (1904).

Thus, under the bankruptcy law in effect prior to the enactment of the Bankruptcy Code:

> It [was] . . . the established rule that jurisdiction once attaching [was] not lost by the fact that later on possession of the property passe[d] to strangers without order of the Court and while the bankruptcy proceeding [was] still active. It [was] immaterial whether the change in possession ha[d] come about through voluntary transfer by the bankrupt or his agents, seizure by the officers of state courts, or unauthorized surrender by officers of the bankruptcy court; the jurisdiction continue[d] and the court ha[d] summary power to order a return of the property. The filing of the bankruptcy petition ha[d] the effect of an attachment and injunction and the property [was] in *custodia legis*.

Matter of Retail Stores Delivery Corp., 5 F.Supp. 892, 893 (S.D.N.Y. 1933). (See also, *In re P & Z Island Farms, Inc.*, 478 F. Supp. 529 (1979). [Bankruptcy Court deemed to have possession of and title to property as of the date the bankruptcy petition is filed and a wrongful transfer occurring after that date violates the ownership interest of the court]. Indeed, under the Bankruptcy Act, the bankruptcy court's exclusive jurisdiction over property in *custodia legis* was unquestioned. *Cline v. Kaplan*, 323 U.S. 97 (1944); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Harrison v. Chamberlain*, 271 U.S. 191 (1926); *May v. Henderson*, 268 U.S. 111 (1925); *Taubel-Scott-Kitzmiller v. Fox*, 264 U.S. 426 (1924); *White v. Schloerb*, 178 U.S. 542 (1900).

The sovereign immunity of the States or the United States did not prevent a bankruptcy court from compelling the return of property which was part of the bankruptcy estate. "Sovereign immunity protects the property which belongs to the government independent of the bankruptcy process," but where the property has been transferred to the government from the bankruptcy estate, the bankruptcy court retains jurisdiction over the property until the case has been closed and has the power to order its return where appropriate. *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 245 (9th Cir. 1989).

Consequently, the sovereign immunity of the United States did not prevent the bankruptcy court from compelling the United States to repay funds distributed from the bankruptcy estate. *In re Pittsburgh*

Railways, 253 F.2d 654, 657 (3d Cir. 1958), and *In re Greenstreet, Inc.*, 209 F.2d 660, 663 (7th Cir. 1954). Similarly, the bankruptcy court's jurisdiction was not severed upon the payment of a dividend from the bankruptcy estate. If the dividend was for an incorrect amount, the bankruptcy court could order a refund of the overpayment from the United States notwithstanding any assertion of sovereign immunity. *In re Madden*, 388 F. Supp. 47, 50 (D. Idaho 1975). Neither did sovereign immunity bar an action to recover money seized from the debtor's bank accounts after the filing of the bankruptcy petition. *Matter of Reiber's Inn of Westchester, Inc.*, 1 B.R. 304, 306-07 (Bankr. S.D.N.Y.), *aff'd In re Reiber's Inn of Westchester, Inc.*, 3 B.R. 706 (S.D.N.Y. 1980). Thus, under the Bankruptcy Act, if property was removed from the jurisdiction of the bankruptcy court without authorization by the court or the bankruptcy law, the bankruptcy court could compel the United States to return the property to the estate.

In enacting the jurisdictional grant of authority under the Bankruptcy Code of 1978 (the "Code"), which ultimately became 28 U.S.C. §1334, Congress stated that "[t]he idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction *as well as in rem jurisdiction* to handle everything that arises in a bankruptcy case."[5] H.R. Rep. No. 595, 95th Cong., lst Sess. 445 (1977). Without any intent or indicia of abandoning

[5]Although this statement was made regarding the enactment of 28 U.S.C. §1471, subsection (e) of which was determined to be unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the language of §1334(d) as enacted was substantially identical to the language of its parallel provision §1471(e) which had granted the district court exclusive jurisdiction over the property of the debtor and property of the estate.

the line of cases dealing with *in rem* jurisdiction, Congress specifically broadened the grant of *in rem* jurisdiction when it enacted 28 U.S.C. §1471, which became §1334 as a result of the Bankruptcy Amendments and Federal Judgeship Act of 1984. It did so in a number of ways. First, by granting exclusive jurisdiction to the district court, of which the bankruptcy court is a unit. Second, it provided that jurisdiction is granted not only to the court in which the case is commenced, but also where ever the case may be pending. Third, it made clear that the grant of exclusive jurisdiction extended not only to property of the debtor, *but also to property of the estate*. 28 U.S.C. §1334(d). Finally, Congress provided that jurisdiction over property of the estate applies equally over all types of cases under title 11, whether liquidation or rehabilitation. KING, 1 COLLIER ON BANKRUPTCY ¶3.01[vii], at 3-32 (15th Ed. 1989).

Congress also intended a broad range of property to be included in the estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204. Section 541 of the Bankruptcy Code provides that:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> • • •
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. §541(a). The statutory language also makes it clear that property of the estate is intended to include in the estate any property made available to the estate pursuant to other provisions of the Bankruptcy Code. 11 U.S.C. §541(a)(3); *Whiting Pools*, 462 U.S. at 205.

Section 542(a) of the Bankruptcy Code further provides that

> [A]n entity, other than a custodian, in possession, custody, or control, *during the case*, of property that the trustee may use . . . shall deliver to the trustee and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. §542(a). [Emphasis added].

It is clear that the *in rem* jurisdiction of the bankruptcy court was enhanced by the enactment of the Bankruptcy Code. Pursuant to 28 U.S.C. §1334(d), the filing of the Debtor's petition vests in the district court of which the bankruptcy court is a unit, jurisdiction over all of the debtor's property. Absent post-petition orders by the bankruptcy court which alter or change that property interest, the court's jurisdiction over property of the estate continues until the case is closed. *In re Maislan Industries, U.S., Inc.*, 69 B.R. 771 (E.D. Mich. 1986). This jurisdictional grant provides a basis for the issuance of orders directing the return to the trustee in bankruptcy of property of the estate, transferred post-petition and without authority of the bankruptcy court or under any provision of the Bankruptcy Code. Thus, in *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025, 1026 (5th Cir. 1985), it was held that the filing of a petition under Chapter 11 of the Bankruptcy Code automatically stayed the proposed sale of the debtor's vessel to enforce a maritime lien and deprived the admiralty court of jurisdiction over the vessel.

Therefore, the post-petition sale of the vessel was determined to be null and void and the vessel was ordered returned to the debtor. (See also, *In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985).

Additionally, Congress, in §502(j), specifically codified the right to recover overpayments by or from the estate, the express language being "This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor." 11 U.S.C. §502(j). Similarly, the absolute prohibition on post-petition removal of property of the estate from the *in rem* jurisdiction of the Bankruptcy Court was codified in §549, which in substance provides, that the trustee may avoid a transfer of property of the estate - made after the commencement of the case; that is not authorized by the Bankruptcy Code or an order of the Bankruptcy Court.

Here, the trustee commenced his action to obtain the recovery of property of the estate, the sum of $20,000.00, transferred to the United States after the commencement of the Debtor's bankruptcy case without authorization by the bankruptcy court or any provision of the Bankruptcy Code. The bankruptcy court found that there was "no dispute that the transfers took place subsequent to the filing of the Chapter 11 petition and were not authorized by the Code or this Court." (Petition - Appendix E - p. 48a). The District Court, in its Post-Judgment Order denying the United States' Motion to Alter or Amend Judgment, found that the United States had notice of the pendency of the bankruptcy proceedings and was on constructive notice as to the source of the funds since the cashiers check for $20,000.00 which the United States received referenced the debtor as the remitter. (Petition - Appendix B - p. 40a). The Sixth Circuit Court of Appeals also found that:

> Because of the words "REMITTER: SWISS HAUS, INC.," it cannot be said that the IRS acted without knowledge of the voidability of the transfer . . . This notation is sufficient to place a reasonable person on notice that the transfer was illegitimate, and by extension, that it was voidable.

(Petition - Appendix A - p. 16a). Petitioner has not appealed either of these determinations and it is, therefore, undisputed that the transfer at issue was an unauthorized post-petition transfer of property of the estate, made without authorization of the bankruptcy court or any provision of the Bankruptcy Code and that the United States had notice that the funds were from the Debtor's bank account.

Clearly, under these facts, the United States cannot bar recovery of this property of the Debtor's bankruptcy estate by hiding behind the shield of sovereign immunity. The Debtor's bankruptcy case is still pending. The property is within the *in rem* jurisdiction of the bankruptcy court since 28 U.S.C. §1334(d) grants the district court exclusive jurisdiction over the property of the estate. Because the status of the funds as property of the estate has not been altered by a bankruptcy court order, the property has retained its character as property of the estate and the court's jurisdiction thereover continues. Finally, because the funds are property of the estate the Court has an obligation to make sure that the funds are distributed equally among creditors in accordance with §726 of the Bankruptcy Code.

Thus, the Sixth Circuit Court of Appeals correctly affirmed the decision of the courts below requiring the United States to return the the property of the estate which it received after the commencement of the Debtor's bankruptcy case and without authorization by either the bankruptcy court or the Bankruptcy Code. To

hold otherwise would violate the grant of jurisdiction found in 28 U.S.C. §1334(d), the provisions of the bankruptcy code governing collection, liquidation and distribution of property of the estate, as well as one of the central policies of bankruptcy law, equality of distribution among creditors.[6]

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[6]Petitioner acknowledges that the Trustee's claim against the United States is based upon a defalcation by an officer of Nordic Village after the Chapter 11 petition was filed. (Brief for United States - p. 12, n. 14). Essentially the United States argues that a fiduciary may embezzle trust money to pay the fiduciary's personal tax obligations and that the stolen money cannot be recovered from the United States because of governmental immunity. This is clearly contrary to the law of trusts. The general rule being, where property held in or upon any trust is misapplied or converted it remains subject to the rights of the original owner or beneficiary of the trust. *Cook v. Tullis*, 85 U.S. 332 (1873); *Oliver v. Piatt*, 44 U.S. 333 (1845); *Cf., In Re: Bell & Backwith*, 838 F.2d 844 (6th Cir. 1988); *RESTATEMENT OF RESTITUTION* §168 (1937). These precepts are applicable to the United States as this Court has recognized:

> The United States we have held cannot, as against the claim of an innocent party, hold his money which has done into its treasury by means of the fraud of their agent. *United States v. State Bank*, 96 U.S. 30 [(1877)]. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts to a fraud on the taxpayer.

Bull v. United States, 295 U.S. 247, 261 (1935); *United States v. State Bank*, 96 U.S. 30 (1877). The United States is required to be honest with its citizens just as much as its citizens are required to exercise common honesty with their government. For, as Justice Frankfurter wrote, "the doctrine [of sovereign immunity] is not absolute, . . . considerations of fair play must be taken into account in its application." *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 364 (1955). Thus, where here, the United States received trust money, with notice of the bankruptcy and notice of the source of the funds and applied them to a third persons obligations, sovereign immunity should not be a bar to recovery of the funds.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §106(c) OF THE BANKRUPTCY CODE CONSTITUTES A BROAD WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES IN BANKRUPTCY CASES AND THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE THE BANKRUPTCY COURT TO ISSUE AN ORDER COMPELLING THE UNITED STATES TO RETURN TO THE TRUSTEE PROPERTY OF THE ESTATE TRANSFERRED TO THE UNITED STATES POST-PETITION AND WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR BY ANY PROVISION OF THE BANKRUPTCY CODE.

It is beyond question that Congress has waived the sovereign immunity of the United States under any provision of the Bankruptcy Code which contains the words "creditor", "entity", or "governmental units". Section 106 is clearly designated a "Waiver of Sovereign Immunity". 11 U.S.C. §106. By its express language, §106(c) provides that "*notwithstanding any assertion of sovereign immunity* . . . a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units." 11 U.S.C. §106(c). The term "governmental unit" is specifically defined to include the United States and any department, agency or instrumentality of the United States. 11 U.S.C. §101(26). Thus, this Court must merely determine whether or not an order to return property of the estate, transferred to the United States after the commencement of the bankruptcy case without authorization by either the bankruptcy court or the Bankruptcy Code, is within the scope of this waiver.

Petitioner, in essence, argues that this waiver of sovereign immunity is limited to declaratory or injunctive relief and does not encompass monetary recovery as the language of §106(c)(2) provides that "a determination by the court of an issue arising under such a provision [one containing one of the trigger words] binds governmental units." Petitioner specifically relies on this Court's recent decision in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989), a case involving the Eleventh Amendment immunity of the States. In *Hoffman*, 492 U.S. at 104, a plurality of a sharply divided Court concluded that the language of §106(c) did not abrogate the Eleventh Amendment immunity of the States to actions for monetary relief where the State did not waive its immunity by filing a proof of claim.

An examination of the opinions entered in *Hoffman* indicates that the case contains no controlling analysis of §106(c) of the Bankruptcy Code. Four justices, in an opinion written by Justice White, concluded that §106(c) did not abrogate the sovereign immunity of the states as Congressional intent to do so was not unmistakably clear in the language of the statute. *Hoffman*, 492 U.S. at 104. Four Justices, in an opinion written by Justice Marshall, held that the language of §106(c) satisfied even the requirement that Congress' intent to abrogate the Eleventh Amendment immunity of the States be "unmistakably clear" and that §106(c) did authorize a bankruptcy court to issue a money judgment against a State that had not filed a proof of claim in a bankruptcy proceeding. *Hoffman*, 492 U.S. at 106 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting). The deciding vote was delivered by Justice Scalia, who did not construe the statute, concluding instead that Congress did not have the power to abrogate the States' Eleventh Amendment immunity and

therefore Congressional intent to do so was irrelevant. *Hoffman*, 492 U.S. at 105. The opinion of an equally divided court is entitled to no precedential value. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *TWA, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977); *Neil v. Biggers*, 409 U.S. 188, 192 (1972); see also, *In re Pearson*, 917 F.2d 1215, 1216 (9th Cir. 1990), petition for cert. pending No. 90-1208, ("While other courts have found this rationale sufficient, we know that four is less than five.").

The *Hoffman* decision focused on a narrow legal issue, an issue which is not present in this case: "whether §106(c) of the Bankruptcy Code, 11 U.S.C. §106(c), authorizes a bankruptcy court to issue a money judgment against a *State* that has not filed a proof of claim in the bankruptcy proceeding." [Emphasis added]. *Hoffman*, 492 U.S. at 98. The standard applied by the plurality was whether Congress had made its intent to abrogate the *States'* Eleventh Amendment immunity "unmistakably clear in the language of the statute." *Hoffman*, 492 U.S. at 101 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The plurality held that "in enacting §106(c) Congress did not abrogate the Eleventh Amendment immunity of the *States*" further emphasizing the narrowness of the issue it was deciding. [Emphasis added]. *Hoffman*, 492 U.S. at 104.

The present case deals with the sovereign immunity of the United States. Congressional power to abrogate the States' Eleventh Amendment immunity is not at issue. There is no question as to the power of Congress to waive federal governmental immunity, just as there is no doubt that Congress has full power to determine the extent to which the United States may be subjected to suit. *FHA v. Burr*, 309 U.S. at 244. Thus, the Court of Appeals correctly concluded that:

> This is a simple case involving the construction of language enacted by Congress, not a constitutional amendment relating to a fundamental concept of federalism. We do not have before us in this case issues relating to states' rights and central power and the various doctrines that have been developed to prevent overreaching by the federal government.

(Petition, Appendix A - p. 12a).[7]

Further, while it is true that under the common law doctrine of sovereign immunity the United States, like the States, has an interest in being free from suit, there is a distinction between common law sovereign immunity and the constitutional protections of the Eleventh Amendment. Common law sovereign immunity protects the government from a suit brought by one of its own

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[7]Numerous other courts have also concluded that *Hoffman* is not applicable in a case involving the United States. In *In re Simmons*, 110 B.R. 72, 73 (Bankr. M.D. Fla. 1990) the bankruptcy court held that "The [Internal Revenue Service's] reliance upon *Hoffman* is inapposite. The holding in *Hoffman*, like the [Eleventh] [A]mendment, does not apply to the federal government. *Hoffman* simply holds that a state is immune from damage claims of the Trustee under the [Eleventh] [A]mendment." Similarly, in *In re Iverson*, 108 B.R. 272, 273 (Bankr. D. Or. 1989) the bankruptcy court concluded that "The government misreads *Hoffman*. The Court did not under any reasonable construction reduce jurisdiction in cases against the United States such as *United States v. Whiting Pools, Inc.*, . . . where there is clear Congressional consent to liability and a substantive waiver of sovereign immunity." In *In re Price*, 103 B.R. 989, 994 (Bankr. N.D. Ill. 1989) aff'd. *In re Price* — B.R. — (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796), the bankruptcy court, in a decision recently affirmed by the district court, held that "The IRS's reliance on *Hoffman* is inapposite. The holding in *Hoffman* does not apply to the federal government. . . . The Supreme Court, interpreting the section 106 waiver of sovereign immunity narrowly, held that §106(c) should not be read to abrogate the [Eleventh] [A]mendment immunity of the state where the state has not voluntarily consented to a waiver."

citizens. A waiver of common law sovereign immunity goes to "whether" or "when" the government may be sued. The Eleventh Amendment, on the other hand, is a specific Constitutional provision which prohibits suits against the States in federal court. *In re Lawson Burich Association, Inc.*, 59 B.R. 681, 687 n. 8 (Bankr. S.D. N.Y. 1986), citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99-100 (1984); *In re 995 Fifth Ave. Associates, L.P.*,116 B.R. 384, 390 n. 5 (Bankr. S.D.N.Y. 1990). The Eleventh Amendment thus speaks to the forum in which a state may be sued and this Court has required plaintiffs to meet a stringent standard in demonstrating Congressional intent to abrogate this Eleventh Amendment immunity so that a state may be sued in federal court. (See *Atascadero*, 473 U.S. at 243; *Pennhurst State School*, 465 U.S. at 99-100). There is no analogous choice of forum problem where the United States or its agencies are sued in federal court. Therefore, Petitioner's assertion that the Court of Appeals should have utilized the stringent standard applied by the plurality in *Hoffman* in this case involving a Congressional waiver of federal sovereign immunity is incorrect as a matter of law.

A. Congressional Waivers Of Federal Sovereign Immunity Are To Be Liberally Construed.

This case involves the waiver of federal sovereign immunity by Congress. This Court's analysis must start with the premise that such waivers by Congress of governmental immunity are to be liberally construed. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 517; *Block v. Neal*, 460 U.S. at 298; *United States v. Yellow Cab Co.*, 543 U.S. at 554-55; *United States v. Aetna Surety Co.*, 338 U.S. at 383; *FHA v. Burr*, 309 U.S. at 245. This approach "is in line with the current disfavor of the doctrine of the governmental

immunity from suit as evidenced by the increasing tendency of Congress to waive the immunity. . . ." *Franchise Tax Board of California*, 467 U.S. at 517 (Quoting *FHA v. Burr*, 309 U.S. at 244). For as this Court observed in *United States v. Shaw*, 309 U.S. 495, 501 (1940), "A sense of justice has brought a progressive relaxation by legislative enactment of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities permit, prerogatives of government yield to the needs of the citizen...when authority is given, it is liberally construed." Thus, if a waiver of federal sovereign immunity is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the waiver is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress that the waiver of sovereign immunity be construed in a narrow sense. *FHA v. Burr*, 309 U.S. at 245.

The extent to which the United States is amenable to process is clearly a question of Congressional intent. Both the language of the statute and its legislative history should be examined by this Court in determining Congressional intent. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 520, n. 13. Further, Congressional intent to waive sovereign immunity and the scope of such a waiver can only be ascertained by reference to the underlying Congressional policy. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. at 389.

B. The Plain Language Of Section 106(c) Expressly Waives Federal Sovereign Immunity Under Each Bankruptcy Code Provision Containing Any Of The Three Trigger Words Specified In Section 106(c)(1).

It is well settled that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, as was recently noted by this Court in a case construing other provisions of the Bankruptcy Code:

> The text is only the starting point. . . . "in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Kelly v. Robinson, 479 U.S. 36, 43 (1986) (citations omitted).

Section 106 of the Bankruptcy Code provides:

> (a) A Governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsection (a) and (b) of this section and notwithstanding any assertion of sovereign immunity —

> (1) A provision of this title that contains "creditor", "entity", or "governmental unit", applies to governmental units; and
>
> (2) A determination by the Court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106. It is clear on the face of §106(c), by the use of the language "notwithstanding any assertion of sovereign immunity" that Congress intended to waive any claim of sovereign immunity for the United States under any section of the code containing one of the trigger words.[8]

Congress carefully considered the impact that the proposed Bankruptcy Code would have on the United States. *Whiting Pools*, 462 U.S. at 209. Thus, the choice of the §106(c)(1) trigger words is significant. By choosing "creditor," Congress indicated that the United States was to stand in the same position as any other creditor with respect to pre-petition claims against the estate. See H.R. Rep. No. 595, 95th Cong., lst Sess. 309; S. Rep. No. 989, 95th Cong., 2nd Sess. 21. By applying to the United States those Bankruptcy Code sections incorporating the broad term "entity," and by defining "entity" to include a governmental unit, Congress chose to treat the United States the same as everyone else even where

[8]Besides the Sixth Circuit in this case, numerous Courts have concluded that Congress intended to waive any assertion of sovereign immunity by the Federal Government under any section containing the trigger words listed in §106(c)(1). See, *Neavear v. Schweiker*, 674 F2d 1201, 1202-1204 (7th Cir. 1982); *Gingold v. United States*, 80 B.R. 555, 561 (Bankr. N.D. Ga. 1987); *R & L Refunds v. United States*, 45 B.R. 733, 735 (Bankr. W.D. Ky. 1985); *Gower v. Farmers Home Administration*, 20 B.R. 519, 521-522 (Bankr. N.D. Ga. 1982); *Remke, Inc. v. United States*, 5 B.R. 299, 300-302 (Bankr. E.D. Mich. 1980).

the United States has no pre-petition claim against the debtor. *Whiting Pools*, 462 U.S. at 209.

This Court, in *Whiting Pools*, has previously determined that the United States is subject to a bankruptcy court order to return property of the bankruptcy estate seized pre-petition and pursuant to a valid tax levy. This Court's examination of the Bankruptcy Code in *Whiting Pools* revealed that Congress decided to provide protection to the United States through grants of enhanced priorities for unsecured tax claims, §507(a)(7), by the non-discharge of tax liabilities, §523(a)(1), and by permitting the United States to enjoy the generally applicable right to adequate protection, under §363(e) of the Bankruptcy Code, for property subject to its tax liens. *Whiting Pools*, 462 U.S. at 209. This Court specifically found that the United States was to be treated as any other creditor as nothing in the Bankruptcy Code or its legislative history indicated that Congress intended a special exemption for the United States. *Whiting Pools*, 462 U.S. at 209. All of which is to emphasize the fact that if Congress had intended that the United States be preferred or that it be granted a supercreditor status it could have easily done so by limiting the §106(c) waiver to just those sections containing the term "governmental units". Clearly, Congress intended that the United States be treated just like any other creditor in a bankruptcy case.

Further, the scope of the waiver of sovereign immunity found in §106(c) can only be determined by reference to the Code provisions containing the trigger words "creditor," "entity," and "governmental unit." *Hoffman*, 492 U.S. at 109 (Marshall J., joined by Brennan, Blackmun and Stevens, J.J. dissenting). First, because applicability of any provision to the United States is dependent upon the presence of one of the trigger

words in the statutory language. Second, because the terms of the triggered provisions shape the involvement of the United States in any particular bankruptcy proceeding.[9] Thus, the United States obtains the benefits of those provisions that provide rights to the sovereign and no remedies to the debtor.[10] The United States also obtains the protection of those provisions that provide remedies to the Debtor, but by their express language

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[9]This is not only implicit in the statutory language, it is made explicit by the legislative history wherein Congress indicated the scope of the waiver contained in §106(c) by referring to other provisions of the Bankruptcy Code as examples of provisions made applicable to the United States by §106(c). "For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit." (124 Cong. Rec. 32394 (1978); 124 Cong. Rec. 33993 (1978).

[10]See, e.g., §303(b)(1) (permitting three or more "entities" to file an involuntary case against the debtor); §303(c) (giving "creditors" who do not file an involuntary case the same rights as those who do); §303(j) (requiring notice to all "creditors") before a Court may dismiss an involuntary case); §341(a) (requiring a meeting of "creditors"); §343 (permitting "creditors" to examine the Debtor); §349(b)(3) (revesting property in an "entity" if the petition is dismissed); §361 (setting forth adequate protection for certain property interest of an "entity"); §363(c)(2)(A) (preventing use, lease, or sale of cash collateral assets absent consent of an interested "entity"); §§501 and 502 (regulating filing of proofs of claims by "creditors"); §506(a) (granting secure status to lien "creditors"); §553 (granting rights of setoff to certain "creditors"); §§702(a) and 705 (giving qualified "creditors" the right to vote for the Trustee and the Creditors' Committee); §§507 and 726 (setting forth priorities of distribution to "creditors"); §727(c) (giving a "creditor" the right to object to a discharge); §1102 (providing for Court appointed creditors' committee); §1109(b) (giving a "creditor" the right to be heard on any issue); §1121(c) (providing that a "creditor" may file a reorganization plan). *Hoffman*, 492 U.S. at 108 n. 2 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

are limited to declaratory or injunctive relief.[11] Finally, under a mere handful of the triggered provisions the United States is exposed to money judgments, just like any other creditor or entity. *Hoffman*, 492 U.S. at 108-09 (Marshall J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting).[12]

The existence of a category of provisions limited to declaratory or injunctive relief and the existence of a category of provisions providing for monetary recovery indicates that Congress consciously chose to permit actions for monetary recovery against the United States. The limited number of provisions providing for monetary recovery created under or by the Bankruptcy Code, as distinguished from those existing outside of bankruptcy law, reflect Congressional intent not to limit this remedy with respect to the rights of recovery created by or under bankruptcy law. Additionally, each section

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[11]See, e.g., §365 (permitting the Trustee to assume or reject executory contracts and unexpired leases in certain circumstances); §505 (permitting the Bankruptcy Court to determine the Debtor's tax liability in certain circumstances); §525 (protecting the Debtor against government discrimination in licensing and employment); §1141 (binding "creditors" to the terms of a confirmed reorganization plan and discharging all other claims); §1142 (permitting the Bankruptcy Court to require performance of any act necessary to carry out a confirmed reorganization plan); §1143 (preventing an "entity" that fails to perform a required act from participating in the distribution of estate assets). *Hoffman*, 492 U.S. at 108 n. 3 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[12]Petitioner has specifically identified only four provisions where, under the interpretation of §106(c) adopted by the Court of Appeals, the United States would be exposed to actions for monetary recovery: §549 involving post-petition transfers, §547 involving preferential transfers, and claims for the turnover of funds under §542(a) and §542(b) of the Bankruptcy Code. (Petition, p. 13 n. 15; Brief, p. 14).

permitting monetary recovery is an exercise of a power unique to the bankruptcy laws, reflecting the fact that Congress has the exclusive, unrestricted and paramount right to devise the bankruptcy laws in the United States.

This case involves an unauthorized post-petition transfer of property of the bankruptcy estate by an officer of the Debtor, then acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, to an agency of the United States, the Internal Revenue Service, in payment of the personal tax obligation of the defalcating officer. It is undisputed that the transfer to the United States sought to be avoided by the Trustee occurred post-petition and involved property of the estate. Petitioner has never alleged, and the record is devoid of any indicia or suggestion, that the complained of post-petition transfer was authorized by the Bankruptcy Court or under any provision of the Bankruptcy Code. The Court of Appeals found that under these facts the transfer at issue was voidable under §549 and could be recovered by the Trustee under §550 of the Bankruptcy Code. (Petition - Appendix A, p. 13a-14a). Section 550 of the Bankruptcy Code is a provision containing one of the trigger words found in §106(c). Thus, the scope of the waiver of federal sovereign immunity in this case must be determined by reference to §550 of the Bankruptcy Code.

C. Sections 106(c) And 550(a) Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The United States.

Section 550 of the Bankruptcy Code is the provision which creates a mechanism whereby avoided transfers are brought back into the bankruptcy estate. Section 550(a) provides that:

(a) Except as otherwise provided, in this section, to the extent that a transfer is avoided under §§544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the Trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, *the value of such property*, from —

(1) The initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) Any immediate or mediate transferee of such initial transferee. [Emphasis added].

11 U.S.C. §550(a). By express statutory language, this section authorizes the recovery of the property transferred, *or, if the Court so orders, the value of such property, . . .*". [Emphasis added]. 11 U.S.C. §550(a). By authorizing the "recovery" of the "value" of the property transferred, the statute clearly indicates Congressional intent to waive the sovereign immunity of the United States to actions in bankruptcy court seeking monetary recovery under §550 of the Bankruptcy Code and the specific Code provisions cited therein.[13] Further, the stated purpose for the recovery of any transfers avoided under the specified provisions is to benefit the bankruptcy estate. 11 U.S.C. §550(a).

Transfers avoided under §549 of the Bankruptcy Code may be recovered under §550(a). 11 U.S.C. §550(a). Section 549(a) provides, in pertinent part, that:

[T]he trustee may avoid a transfer of property of the estate —

[13]Similarly, §542(a) provides, in pertinent part, "that an 'entity'... shall deliver to the Trustee... such property or *the value of such property. . .* " 11 U.S.C. §542(a).

(1) made after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

11 U.S.C. §549. The language of §549 is precise and explicit. It grants a trustee in bankruptcy the authority to avoid *all* post-petition transfers of property of the estate that are either unauthorized by the bankruptcy court or by the Bankruptcy Code, including those that are authorized by §§303(f) or §542(c) of the Bankruptcy Code.[14] Once it is determined that a transfer is avoidable under §549, the property transferred or, if the bankruptcy court so orders, "the value of such property" may be recovered by the trustee pursuant to §550(a). 11 U.S.C. §550(a). Clearly, under the facts of this case, and based upon the express language of the §550(a), the scope of the waiver of sovereign immunity contained in §106(c)(1) permits monetary recovery from the United States.

[14]The trustee's avoiding powers under §549 are limited in three ways. Subsections (b) and (c) create two very narrow exceptions to the trustee's power of avoidance. First, §549(b) provides that transfers during the "involuntary gap" period between the filing of the petition and the order for relief in an involuntary case are not voidable to the extent that post-petition value is given. Section 549(c) provides that a trustee may not avoid transfers of realty to good faith purchasers for present fair equivalent value and without knowledge of the commencement of the case, if a copy or notice of the petition has not been filed in an appropriate recording office where the property is located. Section 549(d) contains a separate statute of limitations for the trustee's avoiding powers under §549. None of these limitations are applicable to this case. 4 COLLIER ON BANKRUPTCY ¶549-02 (15th Ed. 1989).

Petitioner argues that the language of §106(c)(2) is a limitation on the waiver of federal sovereign immunity contained in §106(c)(1) and, contrary to statutory language permitting the recovery of the "value of the property transferred", that the bankruptcy court in this case could only enter injunctive or declaratory relief. Petitioner specifically focuses on the words "determination" and "issue". (Brief - p. 10-11). Petitioner's argument ignores one of the fundamental rules of statutory construction, that an otherwise undefined term in a statute must be given its common meaning, absent a clearly expressed legislative intent to the contrary. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Burns v. Alcala*, 420 U.S. 575 (1975). BLACK'S LAW DICTIONARY defines "determination" as "the decision of a court or administrative agency. It implies an ending or finality of a controversy or suit. *Piccone v. U.S.*, 186 Ct.Cl. 752, 407 F.2d 866, 873 [(Ct. Cl. 1969)]" BLACK'S LAW DICTIONARY 405 (5th ed. 1979). The word "issue" is defined as:

> a disputed point or question to which parties to action have narrowed their several allegations and upon which they are desirous of either decision of Court on question or law or of court or jury on question of fact.

BLACK'S LAW DICTIONARY 745 (5th ed. 1979). Petitioner presents no evidence of clear Congressional intent that the words "determination" and "issue" be given anything but their common meanings.

Further, Petitioner's detailed structural analysis of §106 and attempts to assign restrictive interpretations to the statutory language, ignores the fact that its analysis is entirely unsupported by the legislative history. When §106(c) first appeared in the proposed legislation it was specifically stated that:

> The provision indicates that the use of the term "creditor," "entity," and "governmental unit" in Title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective.

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Thus, §106(c)(2), makes explicit the waiver of sovereign immunity by providing that the United States will be bound by those orders of the bankruptcy court embodying the court's decision on any question of law or question of fact arising under any of the provisions containing the trigger words. *Hoffman*, 492 U.S. at 106 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting).

Indeed, if one were to combine the relevant language of §§106(c) and 550(a), the waiver of sovereign immunity would, under the facts of this case read as follows:

> notwithstanding any assertion of sovereign immunity [to the extent that a transfer is avoided under §549 of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, *the value of such property*, from] the United States; and a determination by the Court of an issue arising under [§550(a)], binds the United States.

Read in this fashion, the language clearly reflects that the United States is bound by any decision of the bankruptcy court on any question or point of law arising

under §550(a) of the Bankruptcy Code. Consequently, the bankruptcy court below could order the United States to return to the trustee property of the bankruptcy estate which it received after the commencement of the bankruptcy case and without authorization by the court or the Bankruptcy Code, and the United States was bound by that Order.

D. The Legislative History of §106 Indicates That Congress Intended To Waive The Sovereign Immunity Of The United States To Actions For Monetary Recovery Under A Handful Of Provisions Of The Bankruptcy Code Containing The Trigger Words Specified In §106(c).

In any inquiry to determine Congressional intent, legislative history should be thoroughly considered. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Flora v. United States*, 357 U.S. 63, 65 (1958), aff'd after reh'g, 362 U.S. 145, reh'g denied, 362 U.S. 972 (1960). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 520, n.13. Review of the legislative history of §106(c) is, therefore, proper in this case.

The waiver of sovereign immunity contained in §106 of the Bankruptcy Code evolved in three steps. The waiver originated in a proposal submitted by the Commission on the Bankruptcy Laws of the United States, the language of which provided:

> All provisions of this Act shall apply to the United States and to every department, agency and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137 93rd Cong., lst Sess. Pt. 2 at 10 (1973).[15]

Subsequently, the House and Senate enacted identical narrow waivers of sovereign immunity, providing as follows:

> *Section 106 Waiver of Sovereign Immunity.*
>
> (a) A governmental unit that files a proof of claim under section 501 of this title is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit for which such governmental unit filed a proof of claim or interest under section 501 of this title any claim against such governmental unit that is property of the estate.

H.R. 8200, 95th Cong., lst Sess. 324 (1977); S. 2266, 95th Cong., 2nd Sess. 313 (1978). The Committee reports which accompany this provision were also identical and indicative of the narrowness of the proposed waiver of sovereign immunity, stating:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Con-

[15]The Commission's proposal was included in Bills introduced in the 94th Congress. S. 236, 94th Cong. lst Sess. (1975); H.R. 31, 94th Cong. lst Sess. (1975).

gress has the power to waive sovereign immunity for the federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of bankrupt [sic] estate against a State, though it may exercise its bankruptcy powers through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.

• • •

Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. §501(c).

> This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against the sovereign.

H.R. Rep. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. 989, 95th Cong., 2nd Sess. 29-30 (1978).

Thus, as originally proposed, sovereign immunity would not have been waived unless the United States had submitted to the jurisdiction of the bankruptcy court by filing a proof of claim. Further, although any claim which was property of the estate could be asserted, including specifically those claims which arose independent of the bankruptcy process, relief was limited to compulsory counterclaims and offsets.

These proposals were referred to a Conference Committee where sections 106(a) and (b) were reworded and where §106(c) made its initial and permanent appearance. Although the conference committee did not issue a report, the floor managers of the legislation read into the Congressional Record identical statements explaining the conference committee's work. In this statement, the intent of §106(c) was set forth:

> Section 106(c) relating to sovereign immunity is new. *The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirements in case law that an express waiver of sovereign immunity is required in order to be effective.* [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini).

The scope of the waiver of sovereign immunity contained in §106(c) was then indicated in the legislative history by use of examples demonstrating its effect on the United States:

> Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and the dischargeability of tax liabilities owing by the debtor or the estate prior to or during the bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in §§106(a) and 106(b), *subsection (c) is not limited to these issues, but permits a bankruptcy court to bind*

governmental units on other matters as well. For example, §106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the house report to H.R. 8200 is thereby overruled. [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini).

Subsequent statements by the floor managers added:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini).

An examination of the legislative history of §547 is appropriate in view of the specific reference to that provision contained in the legislative statements surrounding §106(c). Section 547 of the Bankruptcy Code deals with preferential transfers and is one of the provisions which brings into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. *Whiting Pools*, 462 U.S. at 205, n. 10.

The present version of §547 represents a compromise between the two different versions enacted by the House and the Senate. The House version of §547(b)(2) provided a general rule making voidable *any* transfer "for or on account of an antecedent debt owed by the debtor before such transfer was made." Section 547(c) created an exception for debts both incurred and, within 45 days thereafter, paid in the ordinary course of business. Thus, the House bill afforded no special treatment to either withheld taxes or to pre-petition tax payments. Moreover, the House Report's commentary indicated that the trustee would be able to recover pre-petition tax payments unless they fell within the protection of §547(c). This report specifically provided:

> Subsection (b) is the operative provision of the section. It authorizes the trustee to avoid a transfer if five conditions are met. These are the five elements of a preference action . . . Second, the transfer must be for or on account of an antecedent debt owed by the debtor before the transfer was made.
>
> ° ° °
>
> This provision will not apply to permit the trustee to *recover* estimated tax payments by a debtor, because no tax is due when the payments are made.
>
> Therefore, the tax on account of which the payment is made is not an antecedent debt. A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code §7501(a) and thus will not be a preference because the beneficiary of the trust, the taxing authority, is in a separate class with respect to those taxes, if they have been properly held for payment as they will have been if the debtor is able to make the payments.

Subsection (c) contains exceptions to the trustee's avoiding power. . . .

The second exception protects ordinary course of business . . . transfers. . . .

In the tax context, this exception will mean that a payment of taxes when they are due, either originally or under an extension, or within 45 days thereafter, will not constitute a voidable preference. However, if a payment is made later than the last day on which the tax may be paid without penalty, than the payment may constitute a preference, if the other elements of a preference are present. In that case, the tax would be an antecedent debt and would not fall under this exception. *However, the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. §106.*

H.R. Rep. No. 595, 95th Cong., lst Sess. 373 (1977). [Emphasis added]. The proposed §106 to which the House Report refers contained only what is now §106(a) and (b).

The House bill was then sent to the Senate which had been drafting its own legislation. Instead of simply amending H.R. 8200 to conform to that legislation, the Senate passed its own bill, S. 2266, and substituted it for the House version. The Senate bill specifically protected taxing authorities. Section 541(b)(3) of the Senate bill would have excluded from the debtor's estate any "taxes withheld or collected from others pursuant to Federal, State, or local law before the commencement of the case and required to be paid to a governmental unit." Furthermore, in §547(b)(2) of the Senate bill, the Senate totally exempted from the preference rules any prepetition tax payments by the debtor:

> the trustee may avoid any transfer of property of the debtor . . . for or on account of an antecedent debt other than a debt for which the payment is required under the revenue laws of a governmental unit, owed by the debtor before such transfer was made.

S. 2266, 95th Cong., 2nd Sess. 433 (1978).

The Senate report reflected the difference in the proposed legislation. The paragraph in the House Report relating to estimated tax payments and withheld taxes was deleted, and in its place was inserted the comment that "[s]ubsection (b)(2) of this section in effect exempts from the preference rules payments by the debtor of tax liabilities, regardless of their priority status." Those portions of the House Report which discussed the application of the ordinary course of business exception found in subsection (c) was also deleted with no substitution made. S. Rep. No. 989, 96th Cong., 2d Sess. 88 (1978).

Senate and House members then agreed on compromise amendments to the Senate bill, adopting the House version of §547 and rejecting the alternative language contained in the Senate bill. In addition, §547(a)(4) was added, which subsection provided that "a debt for tax is incurred on the day when such tax is last payable, including any extension, without penalty." 11 U.S.C. §547(a)(4).

Subsequently, a joint explanatory statement was given on the Senate and House floors by Senator DeConcini and Representative Edwards respectively. This statement provides, in relevant part, that:

> Section 547(b)(2) of the House amendment [i.e., the floor managers' compromise legislation] adopts a provision contained in the House bill and rejects

> an alternative contained in the Senate amendment [S. 2266] relating to the avoidance of a preferential transfer that is a payment of a tax claim owing to a governmental unit. As provided, §106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to the avoidance of preferential transfers.

124 Cong. Rec. 32400 (September 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (Oct. 5, 1978) (statement of Sen. DeConcini).

As set forth above, the House Report had stated, "However, the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. §106.", thus indicating that sovereign immunity might prevent trustees from recovering preferences in the possession of the government. The joint statement clearly indicates that this language was overruled and that Congress intended that a trustee could assert his avoiding powers against the United States and recover preferential payments from the United States. Nothing found in the Bankruptcy Code, or the legislative history, contains any indicia of an intent to disavow the then existing case law that recognized the *in rem* jurisdiction of the bankruptcy court to take precedence with respect to any claim or assertion of sovereign immunity.

Petitioner relies on a selective reading of snippets of the legislative history to support its position that §106(c)(2) does not authorize a bankruptcy court to order the United States to pay money to a bankruptcy trustee. Quoting a portion of the legislative statements issued in conjunction with the original Senate and House proposals, the present §106(a) and §106(b), which stated "Congress does not, however, have the

power to waive sovereign immunity completely with respect to claims of a bankruptcy estate against the State," Petitioner posits that Congress enacted a narrow waiver of sovereign immunity, equally applicable to the United States and the States, because Congress was concerned about its power to abrogate completely the Eleventh Amendment immunity of the States. Petitioner omits the balance of that sentence which provides that Congress "may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." S. Rep. No. 989, *supra*, at 29: H.R. Rep. No. 595, 9th Cong., lst Sess. 373 (1977). Thereby ignoring the fact that §106(c), by waiving sovereign immunity only to specified Bankruptcy Code provisions represents an exercise of Congress' unique power to establish a uniform system of bankruptcy throughout the United States.

Similarly, Petitioner focuses on that portion of the legislative history of §106(c) which reflects Congressional intent to codify *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975), and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), "permitting the bankruptcy court to determine the amount and dischargeabilty of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim." 124 Cong. Rec. 32394 (1978) (comments of Rep. Edwards of California); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Yet the legislative history expressly states that:

> Subsection (c) *is not limited to these issues*, but permits a bankruptcy court to bind governmental units on other matters as well. For example, *§106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmen-*

tal unit; contrary language in the house report to H.R. 8200 is thereby overruled. [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Indeed, if Congress had merely intended to codify the results in *In re Gwilliam* and *In re Dollard*, it need only have modified §505, the provision dealing with determination of tax liability, to address the problem.

Finally, Petitioner grudgingly admits that the legislative history specifies that under §106(c) a trustee will be able to assert his avoiding powers against a governmental unit. However, Petitioner argues that this means that a bankruptcy court can only determine that the transfer is voidable and cannot order its recovery. Petitioner's argument totally ignores the express language of §550, which provides a mechanism whereby the trustee can recover "avoided" transfers, or the value of the property transferred, from an "entity" (i.e., the United States). Further, as indicated above, the legislative history of §547 reflects that Congress understood that the consequences of enacting §106(c) would be to permit a trustee in bankruptcy to not only assert his or her avoiding powers against the United States but to recover the avoided transfer from the United States.

Petitioner's argument overlooks this Court's admonition that a waiver of sovereign immunity is accomplished not by a ritualistic formula but by reference to underlying Congressional policy. *Keifer and Keifer*, 306 U.S. at 389. As stated by this Court in *Block v. Neal*, 460 U.S. 289, 298 (1983) "The exemption of the sovereign from a suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Indeed, here as in *United States v. Yellow*

Cab, 543 U.S. at 554-55 (quoting *Anderson v. Hayes Construction Co.*, 243 N.Y. 140. 147. 153 N.E. 28, 29-30 (1926)), the observation of Judge Cardozo is apt. "No sensible reason can be imagined why the [United States], having consented to be sued, should thus paralyze the remedy." Thus, since the Sixth Circuit's analysis of §106(c) is supported by the language of the statute and the legislative history, the decision below was correct and should be affirmed.

E. The Interpretation Of §106(c) Adopted By The Court Of Appeals Is Consistent With And Advances The System Of Equitable Distribution Of Estate Assets To The Debtor's Creditors Which Is A Central Policy Of The Bankruptcy Code.

Congressional intent to waive federal sovereign immunity and the scope of such waiver can only be ascertained by reference to the underlying Congressional policy. *Keifer & Keifer v. Reconstruction Finance Corp*, 306 U.S. at 389. This Court has previously addressed the issue of whether the bankruptcy court has the power to order an agency of the United States to return property of the estate to the custody of the bankruptcy court. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court identified two Congressional policies which were critical to its holding that §542(a) of the Bankruptcy Code authorized the bankruptcy court to subject the United States to a turnover order with respect to property seized pursuant to a valid tax levy prior to the commencement of the bankruptcy case.

First, this Court determined that Congress intended that a broad range of property be included in the bankruptcy estate, finding that:

§541(a) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." . . . Most important, in the context of this case, §541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under §363 to turn that property over to the trustee. . . .

As does all bankruptcy law, §542(a) modifies the procedural rights available to creditors to protect and satisfy their liens. In effect, §542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings. (Citations omitted).

Whiting Pools, 462 U.S. at 205-06.

This Court specifically noted that its analysis of §542(a) was consistent with other provisions of the Bankruptcy Code which address the scope of the estate: specifically, §544, giving the Trustee the right of a lien creditor; §545, granting the Trustee the power to avoid statutory liens; and §549, granting the Trustee the power to avoid certain post-petition transactions. *Whiting Pools*, 462 U.S. at 207, n. 15. And with other provisions which permit the trustee to demand the turnover of property in the possession of others: §543, dealing with property in the hands of a custodian; §545, granting the Trustee the authority to avoid statutory liens; §547,

granting the Trustee authority to avoid preferential transfers; §548, granting the trustee authority to avoid fraudulent conveyances. *Whiting Pools*, 462 U.S. at 205, n. 10.

Second, this Court determined that the United States was to be treated the same as any other creditor affected by the debtor's bankruptcy case:

> We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by §542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity" used in §542(a), includes a governmental unit. §101(14). . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

462 U.S. at 209.

This case implicates another key Congressional policy behind the enactment of the Bankruptcy Code: equality of distribution of the bankruptcy estate among creditors of the debtor. *Begier v. Internal Revenue Service*, 110 S. Ct. 2258, 2262-63 (1990). As this Court stated in *Acme Harvester*, 222 U.S. at 307, "It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors."

Congress enacted only one provision to ensure there be an equitable distribution of the collected and liquidated estate assets to creditors, §726 of the Bank-

ruptcy Code. Section 726 provides that distribution of these assets will be under the direction and control of the bankruptcy court. 11 U.S.C. §726. Sections §549(a) and §550(a), read together, advance the policy of equality of distribution to creditors that lies at the heart of bankruptcy law by providing a mechanism whereby property of the estate wrongfully transferred after the commencement of the case can be brought back into the bankruptcy estate. Indeed, §541(a)(3) specifically provides that property of the estate shall include any interest in property that the trustee recovers under §550 of the Bankruptcy Code. 11 U.S.C. §541(a)(3). Section 550(a) empowers the trustee in bankruptcy with the ability to recover avoidable transfers for the benefit of the estate. 11 U.S.C. §550(a). Finally, §551 provides for the automatic preservation of avoided transfers for the benefit of the estate. 11 U.S.C. §551. All of these provisions ensure that property of the estate comes within the jurisdiction of the bankruptcy court with a view towards the estate's equal distribution among creditors.

Petitioner alleges that there should be a different result when the United States is the creditor. The essence of Petitioner's argument is that the management of a debtor in possession should be allowed to steal money from the bankruptcy estate and transfer the money to the government in satisfaction of personal tax obligations, and that the bankruptcy court cannot look to the government as the beneficiary of the funds for recovery. Nothing in the Bankruptcy Code or in its legislative history indicates that Congress intended to except the United States from the ambit of §549. Congress specifically provided protection of the interests of the United States by granting it priority status for tax payments and by making certain tax obligations nondischargeable. Otherwise, the express language of the Code mandates that the United States be treated like

any other creditor. To hold differently would be in violation of those provisions that grant the bankruptcy court control over the cases that it administers and would frustrate a fundamental policy of bankruptcy law: equality of distribution to creditors. Consequently, the interpretation of §106(c) by the Court of Appeals is consistent with underlying Congressional Policy.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC.,
RICHARD A. BAUMGART, TRUSTEE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
A. The grant of jurisdiction in 28 U.S.C. 1334 is not a waiver of sovereign immunity	2
B. Section 106(c) of the Bankruptcy Code does not authorize a bankruptcy court to order the United States to pay money to a bankruptcy trustee	9

TABLE OF AUTHORITIES

Cases:

Begier v. *IRS*, 110 S. Ct. 2258 (1990)	5
Blatchford v. *Native Village of Noatak & Circle Village*, 111 S. Ct. 2578 (1991)	2-3, 4
Bull v. *United States*, 295 U.S. 247 (1935)	8
Dugan v. *Rank*, 372 U.S. 609 (1963)	6
Hoffman v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989)	2, 4, 9, 11, 15
Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990)	8
Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939)	10
Gardner v. *New Jersey*, 329 U.S. 565 (1947)	7
Greenstreet, Inc., In re, 209 F.2d 660 (7th Cir. 1954)	7
Grogan v. *Garner*, 111 S. Ct. 654 (1991)	16
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	6
Madden, In re, 388 F. Supp. 47 (D. Idaho 1975)	7
Owen v. *Owen*, 111 S. Ct. 1833 (1991)	16
Pacific Far East Lines, Inc., In re, 889 F.2d 242 (9th Cir. 1989)	6
Pennsylvania Dep't of Public Welfare v. *Davenport*, 110 S. Ct. 2126 (1990)	16
Pennsylvania Turnpike Comm'n v. *McGinnes*, 268 F.2d 65 (3d Cir.), cert. denied, 361 U.S. 829 (1959)	5
Pittsburgh Rys., In re, 253 F.2d 654 (3d Cir. 1958)	7
Reiber's Inn, In re, 3 Bankr. 706 (S.D.N.Y. 1980)	7

Cases—Continued: Page

Snodgrass v. *United States*, 834 F.2d 537 (5th Cir. 1987) 5
Transamerica Ins. Co. v. *Long*, 318 F. Supp. 156 (W.D. Pa. 1970) 6
United States v. *Aetna Sur. Co.*, 338 U.S. 366 (1949) 10
United States v. *Dalm*, 110 S. Ct. 1361 (1990) 8
United States v. *Mottaz*, 476 U.S. 834 (1986) 4
United States v. *Shaw*, 309 U.S. 495 (1940) 7, 8
United States v. *Testan*, 424 U.S. 392 (1976) 8
United States v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940) 8
United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983) 15
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 10

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 106 ..... 1, 2, 6, 10, 11, 13, 14, 15
11 U.S.C. 106(a) 7, 13
11 U.S.C. 106(b) 7, 13, 14
11 U.S.C. 106(c) 1, 2, 9, 11-12, 13, 14, 15, 16
11 U.S.C. 106(c)(1) 11
11 U.S.C. 106(c)(2) 11
11 U.S.C. 505(a) 7
11 U.S.C. 542(b) 4
11 U.S.C. 544-549 12
11 U.S.C. 547 13
11 U.S.C. 547(b) 13, 14
11 U.S.C. 550 12
26 U.S.C. 7422 6
26 U.S.C. 7426 6
26 U.S.C. 7809 5
28 U.S.C. 1331 3
28 U.S.C. 1334 ..... 1, 2, 3, 4
28 U.S.C. 1334(d) 2
28 U.S.C. 1340 6
28 U.S.C. 1342 6
28 U.S.C. 1346(a)(1) 5-6
28 U.S.C. 1362 3

Statutes—Continued: Page

28 U.S.C. 2463 5
31 U.S.C. 3302(c)(1) 5
31 U.S.C. 3720 5

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 11
Collier on Bankruptcy (L. King 15th ed. 1991) 13
124 Cong. Rec. (1978) 14
p. 32,400 14
p. 34,000 14
H.R. 8200, 95th Cong., 1st Sess. (1978) 13
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 12, 13
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1629

UNITED STATES OF AMERICA, PETITIONER

v.

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RICHARD A. BAUMGART, TRUSTEE

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Section 106 of the Bankruptcy Code governs the sovereign immunity of governmental entities in bankruptcy proceedings. This Court granted review in this case to decide whether Section 106(c) of the Code waives federal sovereign immunity from a monetary recovery in bankruptcy. See Pet. (I) (question presented). Respondent nonetheless devotes very little attention to Section 106 in its 47-page brief. Instead, respondent dedicates the first part of its brief to arguing that the Code's waiver of sovereign immunity is concealed in 28 U.S.C. 1334, which grants jurisdiction over bankruptcy cases to the district courts. In the second part of its brief, respondent pays only glancing attention to the language of Section 106, devoting its attention instead to other

Code provisions and to legislative history. Nowhere in its brief does respondent provide a persuasive reason why Section 106(c) should be interpreted to authorize monetary recovery from the United States in the face of this Court's holding in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), that Section 106(c) does not authorize monetary recovery from the States.

A. The Grant of Jurisdiction in 28 U.S.C. 1334 Is Not a Waiver of Sovereign Immunity

In *Hoffman*, this Court looked to Section 106 to determine the scope of the States' sovereign immunity from monetary recoveries in bankruptcy. Respondent argues, however, that "[c]laims or assertions of sovereign immunity" in bankruptcy cases are governed, not by Section 106, but instead by 28 U.S.C. 1334. Resp. Br. 4. Section 1334 of title 28 grants the district court in which a bankruptcy case is commenced "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. 1334(d). Respondent contends that, notwithstanding any assertion of sovereign immunity, under Section 1334 the court may compel either a State or the United States to return any property, including money, that passes into the estate upon commencement of a bankruptcy case. Resp. Br. 4-15. Respondent's novel theory—not advanced in the court of appeals—is plainly without merit.

In fact, this Court rejected a very similar argument just last Term in *Blatchford* v. *Native Village of Noatak and Circle Village*, 111 S. Ct. 2578 (1991) —a case respondent does not even cite. In *Blatchford*, the Court held that the Eleventh Amendment barred a suit by native villages in Alaska seeking monetary recovery from the State under a state revenue-sharing law. In so holding, the Court rejected the Villages' contention that immunity to the suit had been abrogated by 28 U.S.C. 1362, which grants district courts jurisdiction over "all civil actions, brought by any Indian tribe * * * aris[ing] under the Constitution, laws, or treaties of the United States." *Blatchford*, 111 S. Ct. at 2588. The Court determined that Section 1362 did not satisfy the clear-statement requirement for abrogations of Eleventh Amendment immunity, nor even the "minimal clarity requirement" that the Villages contended should apply. 111 S. Ct. at 2585. The Court observed that "the text [of Section 1362] is no more specific than [28 U.S.C.] § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions." *Ibid.* The Court also rejected the Villages' argument on broader grounds: "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.* at 2585 n.4. Having determined that "§ 1362 does not enable tribes to overcome Alaska's sovereign immunity" (*id.* at 2586 n.5), the Court concluded that monetary recovery was barred.

Respondent makes the same mistakes that the Villages made in *Blatchford*. The jurisdictional provision on which respondent relies, 28 U.S.C. 1334, is no more specific than the general grant of federal question jurisdiction in 28 U.S.C. 1331; general grants of jurisdiction cannot be construed to waive

sovereign immunity. *Blatchford*, 111 S. Ct. at 2585.[1] Moreover, respondent confuses the issue of the bankruptcy courts' jurisdiction with the separate issue of their authority to award monetary relief against the sovereign; the two issues are "wholly distinct." *Blatchford*, 111 S. Ct. at 2585 n.4. The issue of sovereign immunity under the Bankruptcy Code is governed by Section 106 of the Code, not by 28 U.S.C. 1334. Section 1334 has nothing to do with sovereign immunity.

This Court's decision in *Hoffman* also requires rejection of respondent's argument regarding 28 U.S.C. 1334. The trustee in *Hoffman* was barred from recovering payments that the State owed under its Medicaid contract with the debtor. 492 U.S. at 99. There was no dispute, however, that the State's indebtedness constituted "property of the estate" within the bankruptcy court's exclusive jurisdiction under 28 U.S.C. 1334. See *Hoffman*, 492 U.S. at 100 (trustee sought to recover Medicaid payments under 11 U.S.C. 542(b), which authorizes recovery of indebtedness "that is property of the estate"). Respondent contends (Resp. Br. 9) that "[t]he sovereign immunity of the States or the United States d[oes] not prevent a bankruptcy court from compelling the return of property which [is] part of the bankruptcy estate." Thus, under respondent's theory, the trustee in *Hoffman* was entitled to recover the money that the State

[1] See also *United States* v. *Mottaz*, 476 U.S. 834, 846 (1986) ("That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right.") (citation omitted).

owed to the debtor because that money was "property of the estate." That theory cannot be reconciled with the result in *Hoffman*.

Contrary to respondent's assertion (Resp. Br. 6-11), there is no support for its theory in "the line of cases dealing with *in rem* jurisdiction" decided under the bankruptcy laws in effect prior to the 1978 Code. Respondent's reliance on these cases is misplaced for several reasons.

First, this case does not involve a *res*; it involves money. This is not one of those rare cases in which money can be the subject of an *in rem* proceeding. The funds that respondent sought to recover have long since been paid into the United States Treasury, as required by statute. See 31 U.S.C. 3302(c)(1); 31 U.S.C. 3720; 26 U.S.C. 7809. There is, therefore, no *res* to which a court's *in rem* jurisdiction could attach. See *Pennsylvania Turnpike Comm'n* v. *McGinnes*, 268 F.2d 65, 66-67 (3d Cir.), cert. denied, 361 U.S. 829 (1959). In any event, respondent did not seek an *in rem* remedy by requesting recovery of "particular dollars," cf. *Begier* v. *IRS*, 110 S. Ct. 2258, 2264 (1990); it sought only to recover a specific sum, J.A. 16. The bankruptcy court accordingly did not purport to exercise *in rem* jurisdiction; it simply entered a money judgment against the IRS. Pet. App. 52a. Thus, contrary to respondent's assertion, this case certainly *does* "involve a claim to funds payable out of the public treasury" (Resp. Br. 4).[2]

[2] It is clear that, if Nordic Village were not in bankruptcy but the facts were otherwise the same, Nordic Village could not recover the transfer at issue here. See *Pennsylvania Turnpike*, 268 F.2d at 66-67 (tax payment deposited into the Treasury cannot be recovered under replevy statute, 28 U.S.C. 2463); see also *Snodgrass* v. *United States*, 834 F.2d 537, 539 & n.2 (5th Cir. 1987) (actions under refund statutes, 28

Because respondent sought relief that would "expend itself on the public treasury," its suit is plainly one against the sovereign, even assuming *arguendo* that in some sense it could also be characterized as a suit against an identifiable *res*. *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); see also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949). Respondent does not cite any decision of this Court (and we are aware of none) supporting respondent's notion that a bankruptcy court can exercise its *in rem* jurisdiction to override sovereign immunity.[3]

U.S.C. 1346(a)(1) and 26 U.S.C. 7422, can be brought only by taxpayers, not by third parties); *Transamerica Ins. Co.* v. *Long*, 318 F. Supp. 156 (W.D. Pa. 1970) (court lacks jurisdiction under 28 U.S.C. 1340 or 28 U.S.C. 1342 over suit by victim of theft against tax official to whom thief paid stolen money to satisfy personal tax liability); cf. 26 U.S.C. 7426 (authorizing persons other than taxpayers under certain conditions to sue United States for wrongful levy on property). Respondent does not explain why a different result should obtain in the bankruptcy context. See S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978) (proposed Section 106 was "designed to achieve approximately the same result that would prevail outside of bankruptcy").

[3] The decisions of this Court that respondent cites (Resp. Br. 7-9) concern the exercise of *in rem* jurisdiction over property in the hands of private persons, not governmental entities. Thus, none of those decisions addresses sovereign immunity. The lower court decisions that respondent cites (Resp. Br. 9-10), with one exception, are cases in which a governmental entity filed a claim against the estate and was thereby found to have waived sovereign immunity to certain claims of the estate. See *In re Pacific Far East Lines, Inc.*, 889 F.2d 242 (9th Cir. 1989) (bankruptcy court ordered the government to refund part of the money that it received as a settlement of the government's claim against the estate because the settlement sum exceeded a statutory maximum that was enacted after settlement but before conclusion of the

On the contrary, in two cases decided the same day, one of which arose under the prior bankruptcy law, this Court made clear that a court cannot exercise *in rem* jurisdiction over an unconsenting sovereign. In *United States* v. *Shaw*, 309 U.S. 495 (1940), the Court held that the United States did not, by filing a claim against a decedent's estate in state court, waive its sovereign immunity to a cross-claim by the estate. The Court rejected as irrelevant the estate administrator's "[e]mphasis * * * upon the fact that these probate proceedings are in rem or

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bankruptcy case); *In re Pittsburgh Rys.*, 253 F.2d 654 (3d Cir. 1958) (similar facts, except the intervening change in law resulted from judicial decisions); *In re Greenstreet, Inc.*, 209 F.2d 660 (7th Cir. 1954) (government filed a claim against the estate based on government contract, and trustee recovered on compulsory counterclaim); *In re Madden*, 388 F. Supp. 47 (D. Idaho 1975) (court reconsidered, and reduced, amount that government had received based on its claim against the estate). The result in these decisions reflects the principle currently embodied in Sections 106(a) and 106(b) of the Code, under which a governmental unit is deemed to waive sovereign immunity to certain claims when it files a claim against the estate. The decisions are thus inapposite here, since respondent does not seek recovery under Section 106(a) or 106(b). The solitary district court decision that arguably supports respondent's position was, in our view, wrongly decided. *In re Reiber's Inn*, 3 Bankr. 706 (S.D.N.Y. 1980). In upholding monetary recovery against a state agency that had not filed a claim against the bankruptcy estate, the court in *Reiber's Inn* erroneously relied (*id.* at 708) on this Court's decision in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). In *Gardner*, however, the Court held that sovereign immunity did not bar a bankruptcy court from determining the allowable amount and priority of a State's claim against the estate for delinquent taxes. 329 U.S. at 573-574. The Court in *Gardner* emphasized that in that case "[n]o judgment [was] sought against the State." *Id.* at 574. Cf. 11 U.S.C. 505(a).

quasi in rem." *Id.* at 502. In *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), the Court relied on its decision in *Shaw* in refusing to accord *res judicata* effect to a prior judgment against the United States that had been entered upon a trustee's cross-claim in a bankruptcy proceeding. *Id.* at 512-515. The Court concluded that, while the bankruptcy court had authority in the prior proceeding to adjudicate the United States' claim against the estate, "[n]o statutory authority granted jurisdiction to the [bankruptcy] [c]ourt to adjudicate a cross-claim against the United States." *Id.* at 512.

As discussed in our opening brief (U.S. Br. 6-8), "[i]t long has been established * * * that the United States, as sovereign, is immune from suit save as it consents to be sued," *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (internal quotation omitted), and that such consent "cannot be implied but must be unequivocally expressed," *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990). This Court's decisions in *Shaw* and *USF&G* demonstrate, contrary to respondent's submission, that no "*in rem*" exception to these principles obtains in bankruptcy cases.[4]

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[4] In addition to its theory that *in rem* jurisdiction overrides sovereign immunity, respondent also resorts (Resp. Br. 15 n.6) to the law of trusts. Here too, respondent erroneously assumes that decisions involving private entities may be applied wholesale to the sovereign. Respondent cites only one decision of this Court involving the government, *Bull* v. *United States*, 295 U.S. 247 (1935). That decision concerned equitable recoupment, a narrow doctrine that has no bearing in this case. See *United States* v. *Dalm*, 110 S. Ct. 1361, 1368 (1990) ("[O]ur decisions in *Bull* and [a later case] stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction.").

B. Section 106(c) of the Bankruptcy Code Does Not Authorize a Bankruptcy Court to Order the United States to Pay Money to a Bankruptcy Trustee

When respondent turns to the question presented here, it repeats the court of appeals' analysis of Section 106(c) of the Bankruptcy Code. As we explained in our opening brief, the court of appeals erred at every turn in concluding—contrary to the conclusion of a plurality of this Court in *Hoffman*—that Section 106(c) authorizes monetary recovery from governmental units. The additional arguments that respondent advances only compound the court of appeals' errors.

1. Respondent, like the court of appeals, relies on purportedly different rules of statutory construction to defend interpreting Section 106(c) to mean one thing when applied to the States but another thing when applied to the United States. Resp. Br. 20-21. As explained in our opening brief (U.S. Br. 7-9), the court of appeals was wrong to treat the scope of federal sovereign immunity under Section 106(c) as "a simple case" of statutory construction and on that basis to arrive at a different interpretation from that of the plurality in *Hoffman* (Pet. App. 12a-13a). Petitioner is even wider of the mark in urging the Court in this case to apply a rule of liberal construction diametrically opposed to the clear-statement rule applied in *Hoffman*. Resp. Br. 20-21.

For one thing, none of the decisions cited by respondent supports the broad proposition that waivers of sovereign immunity should be liberally construed. The decisions on which respondent relies concern ac-

tions under either the Federal Tort Claims Act (FTCA) or various "sue and be sued" clauses. While the Court has suggested on occasion that the FTCA may be liberally construed, the Court has based that suggestion on the FTCA's "sweeping language" and "breadth of purpose." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547, 550 (1951); see also, *e.g.*, *United States* v. *Aetna Sur. Co.*, 338 U.S. 366, 383 (1949). Those decisions are inapposite in light of Congress's clear intent in Section 106 to waive sovereign immunity only in narrowly defined circumstances. See U.S. Br. 12-14, 18-23. Decisions construing sue-and-be-sued clauses are inapposite for a similar reason. Those decisions are based on the language of such clauses—which typically is broader than the language at issue here—and on the quasi-private nature of the activities in which entities subject to sue-and-be-sued clauses typically engage. *E.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 390-392 (1939). Far from being a quasi-private activity, the IRS's receipt of the tax payment that respondent seeks to recover is a quintessential government function.

Moreover, it would be improper to construe Section 106 liberally even if such an approach were justified with respect to other waivers of sovereign immunity. As we discussed in our opening brief, Congress clearly intended in Section 106 to treat the States and the United States the same. U.S. Br. 8-9, 18-19. Respondent never responds to that argument. Thus, he fails to explain how, consistently with Congress's intent to accord identical treatment, Section 106 can be construed to have different meanings depending on whether it is being applied to the States or the United States, solely as a result of applying different

judicial canons. Congress surely did not intend that result.[5]

2. In any event, respondent's treatment of the language of Section 106(c) does not pass muster under the most liberal standard of statutory interpretation. Although respondent does not repeat the court of appeals' error by failing to discuss subsection 106(c)(2), in the process of avoiding that mistake respondent unwittingly confirms that Section 106(c) does not authorize monetary relief. Respondent quotes dictionary definitions of the terms "determination" and "issue" in an attempt to show that the court's authority under Section 106(c)(2) to make a "determination * * * of an issue" arising under Section 106(c)(1) includes the power to make an award of money. Resp. Br. 31. The definitions upon which respondent relies, however, compel the contrary conclusion. According to those definitions, Section 106(c)(2) permits a court only to "deci[de] * * * a disputed point or question." See Resp. Br. 30 (quoting *Black's Law Dictionary* (5th ed. 1979)). Thus, the "common meaning" tendered by respondent, like the actual words of the statute, are "more indicative of declaratory and injunctive relief than of monetary recovery," *Hoffman*, 492 U.S. at 102.

Respondent does not come to grips with our argument that the structure of Section 106 confirms that courts may not award monetary relief under Section

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[5] Nor could Congress have intended for courts to arrive at different interpretations depending on whether they consulted the legislative history of the Bankruptcy Code. U.S. Br. 17-18. In failing to dispute that Congress intended to treat the States and the United States the same, respondent fails to explain why resort to legislative history is proper in this case, even though it clearly would be improper in a case involving a State. *Hoffman*, 492 U.S. at 104.

106(c). See U.S. Br. 12-14. Instead, respondent remarks only that our structural analysis "is entirely unsupported by the legislative history." Resp. Br. 30. Respondent takes a curious approach to statutory construction in suggesting that the text of a statute should be ignored unless it has the blessing of legislative history. In any event, as we discussed in our opening brief, the legislative history convincingly demonstrates that Congress did not, by adding Section 106(c) late in the legislative process and with virtually no debate, intend to restore the broad waiver provision that it had earlier rejected because of constitutional concerns. See U.S. Br. 18-21. Moreover, congressional statements made when Section 106(c) was proposed show that Congress did not intend to authorize monetary relief under Section 106(c). U.S. Br. 21-24.

3. In our opening brief, we explained that references in the legislative history to the trustee's authority under Section 106(c) to *avoid* transfers could not properly be construed as expressing an intent to authorize *recovery* of such transfers. U.S. Br. 23-24. Respondent does not dispute that the Bankruptcy Code clearly "enunciates [a] separation between the concepts of avoiding a transfer and recovering from the transferee." H.R. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977). Compare 11 U.S.C. 544-549 (authorizing avoidance of transfers) with 11 U.S.C. 550 (authorizing recovery of transfers). Respondent nonetheless reproduces the references to the trustee's avoiding powers (Resp. Br. 36), which do not become any more supportive of its position by virtue of repetition. Respondent also seizes on a reference in the legislative history to the "recovery" of tax payments by trustees. Resp. Br. 36-42. The initial difficulty

with respondent's lengthy discussion of this isolated reference is that respondent improperly treats legislative history as if it were statutory text. In any event, respondent's reliance upon this aspect of the legislative history is unavailing.

Respondent relies on a statement in the committee report on the Bankruptcy Code bill that passed in the House, H.R. 8200, 95th Cong., 1st Sess. (1978). See H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977). The bill included as Section 547 a provision regarding the avoidance of preferential transfers that was similar to Section 547 as enacted. H.R. 8200, 95th Cong., 1st Sess. § 547 (1977), reproduced in *Collier on Bankruptcy*, App. 3, at III-419 to III-425 (L. King, 15th ed. 1991). Section 547(b) of the bill authorized the trustee to avoid certain pre-petition transfers made in payment of antecedent debts. H.R. 8200, *supra*, § 547(b). In discussing the applicability of Section 547(b) to the payment of tax debts, the committee report stated that, even if such payments qualified as preferential transfers, "the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. 106." H.R. Rep. No. 595, *supra*, at 373.

The version of Section 106 to which the report referred did not include Section 106(c); that subsection was added later. At the time of the report, Section 106 consisted of two subsections similar to Sections 106(a) and 106(b) as enacted. H.R. 8200, § 106, reproduced in *Collier on Bankruptcy*, *supra*, App. 3, at III-324. Thus, Section 106 of H.R. 8200 provided for waiver of a governmental unit's sovereign immunity only if the governmental unit filed a claim against the estate. Section 106(a) author-

ized affirmative monetary recovery from the governmental unit with respect to compulsory counterclaims of the estate, and Section 106(b) authorized a set-off with respect to other claims of the estate.

In light of the version of Section 106 to which the committee report referred, two things are clear about the report's reference to the "recovery" of tax payments. First, its use of the term "recovery" is at best imprecise. Section 106 of the House bill plainly did not permit an affirmative monetary recovery in every case in which sovereign immunity was waived. The trustee could obtain an affirmative recovery based on a claim of a preferential tax payment only if the trustee's claim was a compulsory counterclaim with respect to the government's claim against the estate. If, on the other hand, the trustee's claim was not a compulsory counterclaim, the trustee could not "recover" anything on the claim, but rather could only set off the claim against the government's claim. Thus, the reference to "recovery" in the report is correct only in the loose sense of including the set-off of monetary claims.

In any event, because Section 106 of the bill did not include Section 106(c), the reference to "recovery" in the report cannot be read to suggest that recovery is permitted under Section 106(c). That no such inference can be drawn is confirmed by the fact that the statement in the report concerning "recovery" was deleted from the floor statements that were made in lieu of a conference report. The floor statement on Section 547(b) stated that under Section 106(c) the government was "subject to avoidance of preferential transfers," 124 Cong. Rec. 32,400 (1978) (statement of Rep. Edwards); *id.* at 34,000 (statement of Sen. DeConcini). But as we explained in our

opening brief and as respondent does not dispute, *avoidance* of a transfer is different from *recovery* of the transfer. U.S. Br. 23-24. The distinction between the two concepts is confirmed by the legislators' replacing the term "recovery" with the term "avoidance" after Section 106(c) was added.

4. Respondent argues (Resp. Br. 43-47) that the Bankruptcy Code evinces a policy to treat the United States "the same as any other creditor." That argument ignores the very existence of Section 106 of the Code, which makes clear that Congress did *not* intend either the United States or any other governmental entity to be on the same footing as private entities. The argument also ignores Congress's rejection of a broad waiver proposal that, in contrast to Section 106, would have placed governmental and private entities on the same footing. See U.S. Br. 18-19. Finally, respondent's argument ignores *Hoffman*, in which the Court recognized that Congress intended to treat the United States the same as the *States*, 492 U.S. at 103, 114, and held that the States were immune from monetary relief under Section 106(c), 492 U.S. at 101-104.

Respondent's reliance (Resp. Br. 45) on this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), is misplaced. *Whiting Pools* sustained the authority of a bankruptcy court to order the IRS to turn over tangible property in which the debtor retained ownership. Nothing in *Whiting Pools* suggests that an order granting a monetary recovery from the United States would have been proper. See U.S. Br. 16 n.19.

Respondent also errs in invoking (Resp. Br. 45-46) the Bankruptcy Code policy favoring equality of distribution among creditors. This Court has em-

phasized that interpretation of the Code must be governed by the language of the Code, not by policy arguments unsupported by any textual authority. *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2132 n.4 (1990); see also *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991). The language of Section 106 makes it clear that Congress intended the scope of federal sovereign immunity to be the same as the scope of state sovereign immunity. Because Section 106(c) does not waive the States' sovereign immunity from monetary relief, it cannot be construed to waive the United States' sovereign immunity from monetary relief. While equality of distribution is among the policies embodied in the Code, that policy cannot be used to "create a distinction that the words of the statute do not contain." *Owen* v. *Owen*, 111 S. Ct. 1833, 1838 (1991), discussed in U.S. Br. 9 & n.10.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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